Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM GLENN TALLEY,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the warrantless, non-exigent entry into petitioner's locked condominium building violated his reasonable expectation of privacy in contravention of the Fourth Amendment, requiring the suppression of evidence secured from his interior dwelling.

RULE 14.1(b) STATEMENT REGARDING PARTIES TO THE PROCEEDING

The Petitioner in this Court is William Glenn Talley. The Respondent is the State of Tennessee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, William Glenn Talley, respectfully petitions, under Supreme Court Rule 12.4, for a writ of certiorari to the Tennessee Supreme Court in *State v. William Talley*, No. M2007-01905-SC-R11-CD.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is published at 307 S.W.3d 723 and is reprinted at App. 1. The opinion of the Tennessee Court of Criminal Appeals is unpublished and appears at App. 24. The Order of the Tennessee Court of Criminal Appeals is unpublished and appears at App. 42. The opinion of the Criminal Court for Davidson County, Tennessee (Trial Court) is unpublished and appears at App. 45.

STATEMENT OF JURISDICTION

The Tennessee Supreme Court issued its Opinion on March 19, 2010. App. 1. This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioner, Mr. William Talley, is the joint owner of a twenty-one unit condominium located in urban Nashville, Tennessee. On August 16, 2005, the police came to the front door of Mr. Talley's private condominium building in response to an anonymous tip that petitioner might be selling drugs from his residence inside the condominium. The police were in possession of this anonymous information for some five days. There was no emergency justifying a warrantless entry into the building; nor was there probable cause for a search. The police were operating under a "knock and talk" procedure to see if they could acquire probable cause to search if contraband was observed "in plain view" once they were inside an interior residence via consent of an occupant.

The primary entrance to the condominium is a windowless, stout wooden door. The door is always locked and is protected by a burglar alarm. Photographs of the building, the front door, and the burglar alarm appear at App. 67-68.

When confronted by the locked front door of the condominium building the police contacted the police dispatcher to obtain the burglar alarm code so as to gain entry into the condominium building itself. This code is reserved only for emergency entry such as a fire. As noted, there was no emergency.

The front door burglar alarm also had a speaker device which would allow an individual outside the door to communicate with the owners of the interior dwellings to seek legitimate entry. However, because the police did not want to "alert" petitioner, the police did not use the speaker device and, instead, sought the code reserved for emergencies. The admitted purpose of this police tactic was to maintain the "element of surprise." While waiting for the dispatcher to provide the secret code, an unknown individual exited the building and the officers slipped into the building. The colloquy in court recites the facts succinctly:

Attorney:	You didn't have permission from anybody?
Officer Simonik:	*Umm.*
DA:	I'll object, your Honor.
Judge:	Overruled. Did you have permission from anybody to go into the common areas of the building?
Simonik:	*Did we have permission from anybody?*
Judge:	Yeah.

Simonik: *Just the police authority to go up and investigate a complaint.*

After gaining entrance to the exterior door, it took the officers forty seconds to walk from the exterior door up to petitioner's unit. Petitioner was not home at the moment. His girlfriend, who was inside, opened the door and observed a number of armed police officers. The police asked to come inside and petitioner's girlfriend consented to allow the officers in.

Once inside, the officers could see what appeared to be drug paraphernalia sitting on the coffee table "in plain view." The officers then questioned the girlfriend and another individual. The police then "froze" the dwelling.

It was only *after* gaining entrance into the interior dwelling the officers made their plain view searches and seizures. As to the reasons for these tactics, Officer Simonik testified: "[O]ur main objective is try to get inside that residence, and gain consent to search that residence. . . . Because I wanted to come inside and talk, to see if there was anything in plain view, where I could obtain a search warrant."

By this time, petitioner, Mr. Talley, arrived at his unit and the police asked him to consent to a search. He *refused* after conferring with an attorney. Mr. Talley was allowed to leave while the police officers then obtained what was to be the first of several search warrants for the now "frozen" dwelling.

After finding pills and some ostensibly pornographic pictures, the police learned that Mr. Talley had a business located in Nashville. Within a few hours the police arrived at Mr. Talley's business armed with a second search warrant. The officers executed the second warrant and found additional contraband. Mr. Talley was inside his business; he was taken into custody and advised of his *Miranda* rights. He made certain statements to the police when they confronted him with evidence secured in the search.

As part of the searches of the dwelling and the business the officers found computers and software. Several additional warrants were issued to inspect these items. The affidavits for these final search warrants relate facts beginning with (1) the consensual entry into the interior dwelling and (2) the plain view observations leading to (3) the search warrant for the dwelling which led to (4) the warrant for the business which was followed by (5) the custodial interrogation of Mr. Talley following his arrest. In short, there was an unbroken series of searches and interrogations, each building on the preceding search or interrogation, all of which was *first* triggered by the initial intrusion into the private condominium building itself.

On March 17, 2006, petitioner, Mr. Talley, was indicted by the Davidson County, Tennessee Grand Jury for two counts of sexual exploitation of a minor by possession of the illicit photographs and four counts of possession of controlled substance with

intent to deliver or sell. The petitioner filed a motion to suppress the contraband contending that the initial, unlawful entry of the condominium building violated his expectation of privacy under the Fourth Amendment to the United States Constitution thus contaminating the later searches and seizures of the contraband. The State stipulated in the trial court: "*That all of the proof and evidence which the State intends to introduce in the trial was derived from the various searches as was testified by the officer at the suppression hearing. . . .*" Thus, the State conceded that the lawfulness of the evidence secured by the several searches was dispositive of the entire case and that there was no other evidence except that secured from the searches.

On June 20, 2007 the trial judge found that the initial entry into Mr. Talley's locked, private condominium building was unlawful:

> The area between the entrance of the condominium building and the defendant's condominium door is within the curtilage of his home, and is protected from warrantless entry by the Fourth Amendment. This area was used in the daily operation of the premises. It is the entrance used by all the residents and delivery personnel. In order for any person other than a resident to gain entry, they must be buzzed in or in possession of an entry code and thus authorized to enter the building. The threshold of the defendant's door extends to the entrance of the condominium building. The pathway that

leads from the sidewalk to the front of the condominium building is for use by the public when conducting legitimate business. The detectives lawfully used the pathway leading to the condominium building's entrance. When the officers arrived outside the building's front entrance, they should have attempted to gain consent to enter the condominium premises in order to conduct the "knock and talk". A "knock and talk" is a consensual encounter and the detectives could have been authorized or refused entry at the front door of the condominium. *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

The [petitioner] has a subjective expectation of privacy in the area between the entrance to the condominium building and the door to his condominium unit. Unlike an apartment tenant, a condominium owner has a property interest in the building. There is a security buzzer at the entrance to the building and persons other than residents need express authorization to enter. Express authorization is given by being buzzed in or by being given the access code. The security buzzer system allows residents to determine the amount of accessibility the general public has to individual condominium units. This expectation of privacy is reasonable for the security and privacy of condominium owners.

The detectives did not have probable cause or exigent circumstances to enter the

> premises without a warrant. The detectives were on the premises to conduct a "knock and talk". The officers had something less than probable cause and reasonable suspicion to engage in this consensual encounter. There were not exigent circumstances at the time of the entry and officers did not claim exigent circumstances existed to justify the warrantless entry. The state argued the detectives' entrance was lawfully obtained by consent given by a person leaving the building as they were entering. It is unknown who held the door open for the officers to enter; the person may have been a resident, guest, or trespasser. This uncertainty is not the equivalent of express authorization. The detectives' entry was an unreasonable departure from an area where the public is impliedly invited and an intrusion upon a constitutionally protected expectation of privacy. . . .

App. 52-54.

While the trial judge found that the initial entry was unlawful, the trial court did not extend this illegality to the search of Mr. Talley's interior, upstairs residence conducted but forty seconds later. Thus, the trial judge denied the motion to suppress. App. 65-66.

On September 19, 2007 the Tennessee Court of Criminal Appeals granted the Appeal by Permission of the dispositive Fourth Amendment issue. App. 45.

On July 1, 2009 the Tennessee Court of Criminal Appeals affirmed the trial judge's Order, but for a different reason, holding that the officer's warrantless, surreptitious entry into the locked condominium building did not violate petitioner's expectation of privacy. App. 24. The Court of Criminal Appeals held that if the initial entry were deemed unlawful then the resulting searches would have violated the Fourth Amendment as the fruit of the poisoned tree:

> Given the possibility of further appellate review, we will now determine whether the trial court properly concluded that [petitioner's girlfriend] Kimberly Knight's consent for the detectives to enter the condominium cured the taint of their illegal entry into the building. Again, we disagree with the trial court's conclusion.
>
> In *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 416 (1963), the United States Supreme Court observed that the exclusionary rule bars the admissibility of evidence obtained both directly and derivatively from an unlawful invasion of an individual's privacy or personal security. However, the court declined to hold that "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." 371 U.S. at 487-88, 83 S. Ct. at 417. Instead, the court held that, in determining whether physical or verbal evidence is the fruit of a prior illegality, the "apt question . . . is 'whether,

granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" 371 U.S. at 488, 83 S. Ct. at 417. Therefore, consent to search that is preceded by a Fourth Amendment violation may nevertheless validate the search if the consent is voluntary. *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1998); see *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2059 (1973). Moreover, the consent must be "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun*, 371 U.S. at 486, 83 S. Ct. at 416-17. "The first prong focuses on coercion, the second on causal connection with the constitutional violation." *United States v. Chavez-Villarreal*, 3 F.3d 124, 127 (5th Cir. 1993). The trial court found, and the appellant does not dispute, that Knight's consent was voluntary. Therefore, we turn to the causal connection and whether Knight's consent was an exploitation of the prior unlawful entry. See *State v. Garcia*, 123 S.W.3d 335, 346 (Tenn. 2003).

To determine whether the causal connection between a Fourth Amendment violation and a consent to search has been broken, a court should consider the following three factors set forth by the United States Supreme Court in *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 2261-62 (1975):

(1) the temporal proximity of the illegal seizure and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Although the trial court did not address the issue of attenuation, the question of attenuation is one that this court reviews de novo. *State v. Ford*, 30 S.W.3d 378, 380 (Tenn. Crim. App. 2000). The State carries the burden of establishing sufficient attenuation. *Brown*, 422 U.S. at 604, 95 S. Ct. at 2262.

The evidence at the suppression hearing established that after the detectives entered the building, they immediately went upstairs to the appellant's condominium and knocked on the door. According to Charles Reasor's testimony, this would have taken only one to two minutes. Therefore, factor one, the temporal proximity of the illegal seizure and the consent, weighs against attenuation.

As to factor two, the presence of intervening circumstances, the detectives knocked on the door and Knight opened it. The detectives asked to speak with the appellant, and Knight told them the appellant was not there. The detectives then asked to enter the condominium but did not verbally inform Knight that they were detectives investigating a crime. We conclude factor two also weighs against a finding of attenuation.

Next, we consider the third factor, the purpose and flagrancy of the official misconduct. Detective Simonik gave contradictory

> testimony about the identity of the informant, testifying on direct examination that the informant was anonymous but testifying on cross-examination that he got the informant's name. Moreover, although the detectives had not received any information that Knight was involved in the appellant's alleged criminal activities, they asked to enter the condominium even though the appellant was not there.
>
> Finally, when asked at the suppression hearing why the detectives did not end the investigation when the detectives learned the appellant was not present, Detective Simonik said, "I wanted to come inside and talk, to see if there was anything in plain view, where I could obtain a search warrant. There happened to be stuff in plain view in order for me to obtain that search warrant." The third factor also weighs against a finding of attenuation. Therefore, had we determined that the officers entered the building unlawfully, the State's failure to show the consent was sufficiently attenuated from the entry into the building would have required suppressing the evidence.

App. 38-41.

The Tennessee Supreme Court granted review. On March 19, 2010 the Tennessee Supreme Court held that: "Because the [petitioner] did not have a reasonable expectation of privacy in the commonly shared, interior hallway of a condominium complex

that ran from the front entrance to his unit's doorway, the motion to suppress was properly denied." App. 1.

REASONS FOR GRANTING THE WRIT

This case presents a narrow federal constitutional question of first impression in this Court that has split several state and federal courts: whether a police officer's unlawful entry into the primary entrance of a locked, private condominium building requires the suppression of evidence secured by means of a later plain view seizure when the occupant opened the door to the upstairs, interior residence as part of a police "knock and talk" investigation. Here, the trial judge found that the initial entry into petitioner's locked, private condominium building was unlawful. This finding is amply supported by the record since petitioner was co-owner of the condominium and had a legitimate expectation of privacy in the jointly owned, common area of the building which was protected by a locked front door complete with a burglar alarm. However, the trial judge did not extend this illegality to the search of petitioner's interior, upstairs residence conducted but forty seconds later. It was this misapplication of the "fruit of the poisonous tree" doctrine which was central to petitioner's appeal from the trial judge's order ultimately upholding the seizure of contraband from petitioner's residence.

Although the trial judge found the initial entry into the condominium was unlawful, the Tennessee Supreme Court resolved the case in a different manner, holding – in the teeth of the trial judge's finding of fact and conclusion of law – that the officer's warrantless, surreptitious entry into the locked condominium building did not violate any expectation of privacy; there was, in short, no initial illegality. Thus, the tree was never "poisoned" and the later consensual entry into the upstairs dwelling forty seconds later was uncontaminated, resulting in a lawful seizure of the contraband. It is the misapplication of settled notions of expectations of privacy in one's home and urban curtilage which is central to petitioner's appeal to this Court from the decision of the Tennessee Supreme Court ultimately upholding the seizure of contraband from petitioner's residence.

This Court should grant certiorari to address the Tennessee Supreme Court's ruling that the officer's initial intrusion into the private condominium building did not contravene the Fourth Amendment. The Tennessee Supreme Court's opinion, if left undisturbed, will allow the police to enter locked, private condominiums without a search warrant or other recognized warrant exception. We do not yet live in a police state where our locked, private halls are open to the government to roam at will to see what turns up. This is an important issue worthy of this Court's review.

A. The Court Should Grant the Petition for a Writ of Certiorari to Resolve the Conflict In Federal and State Interpretations of the Fourth Amendment to Warrantless Entrance of Secured Doors to Common Areas of Urban Dwellings.

The proof at the suppression hearing established that police officers went to the front entrance of petitioner's condominium as part of a "knock and talk" procedure. Neither probable cause nor reasonable suspicion is needed to conduct a "knock and talk." *State v. Cothran*, 115 S.W.3d 513, 522 (Tenn. Crim. App. 2003) ("[I]t is not improper for a police officer to call a particular house and seek admission for the purpose of investigating the complaint or conducting other official business."); *Hayes v. State*, 794 N.E.2d 492, 497 (Ind. Ct. App. 2003):

> Knock and talk might more aptly be named "knock and enter," because it is usually the officer's goal not merely to talk but to conduct a warrantless search of the premises. While not per se unlawful, the knock and talk procedure "pushes the envelope" and can easily be misused. The right of the people under the Fourth Amendment to be secure in their houses against unreasonable searches and seizures would be well served if there were well-defined procedures in place governing this type of investigation.

See also Craig M. Bradley, "*Knock and Talk*" *and the Fourth Amendment*, 84 Ind. L.J. 1099 (2009) (explaining that knock and talk "is a powerful

investigative technique" where "police go to people's residences, with or without probable cause, and knock on the door to obtain plain views of the interior of the house, to question the residents, to seek consent to search, and/or to arrest without a warrant, often based on what they discover during the 'knock and talk'").

Naturally, the location where the police are standing when they do their "knocking" is highly significant. *See State v. Somfleth*, 8 P.3d 221, 225 (Or. Ct. App. 2000):

> Neither the warrant nor their status as peace officers gave them any greater right to intrude onto defendant's property than any other stranger would have. Going to the front door and knocking was not a trespass. Drivers who run out of gas, Girl Scouts selling cookies, and political candidates all go to front doors of residences on a more or less regular basis. Doing so is so common in this society that, unless there are posted warnings, a fence, a moat filled with crocodiles, or other evidence of a desire to exclude casual visitors, the person living in the house has impliedly consented to the intrusion. *Going to the back of the house is a different matter. Such an action is both less common and less acceptable in our society. There is no implied consent for a stranger to do so.* We do not place things of a private nature on our front porches that we may very well entrust to the seclusion of a backyard, patio or deck. The facts of this case do not show either an

> express or an implied consent for strangers to go to the back of defendant's house.

(quotation omitted). A first-rate discussion of the history and use of the "knock and talk" doctrine in our country is provided in *United States v. Walters*, 529 F.Supp.2d 628, 636-39 (E.D. Tex. 2007). After canvassing the many cases which uphold searches following legitimate police approach to a citizen's front door, *Walters* also illustrates situations in which the police may violate the Constitution:

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof – whether the questioner be a pollster, a salesman, or an officer of the law. . . .
>
> A "knock and talk" is not wholly immune from the exclusionary rule, however, since it can occur under circumstances that constitute a search or seizure subject to Fourth Amendment protection. For example, should an officer approach a home via a tactically-chosen route other than a walkway leading to the front or principal entrance, i.e., a route different than a typical visitor would choose, or should an officer enter an area clearly closed off to ordinary guests visiting the

> house, the officer likely will intrude on the dweller's reasonable expectation of privacy and thereby conduct an unlawful search.

Id. at 638 & n.11 (citing *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964)).

This Court has emphasized the principal that one's home is one's castle. *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."). An officer need not intrude only into a person's bedroom to violate a person's constitutional rights: intrusion past the locked front gate is sufficient to intrude upon the expectation of privacy. *See Kyllo v. United States*, 533 U.S. 27, 40 (2001) ("We have said that the Fourth Amendment draws 'a firm line at the entrance to the house.' That line, we think, must be not only firm but also bright. . . .").

While the police may walk upon a person's property if that property consists of no more than "open fields," the police may not, without a warrant, intrude upon the "curtilage," which is the land immediately surrounding and associating with the home. At common law, the curtilage is the area of intimate activity associated with the sanctity of a person's home and privacy of life and therefore has been considered part of the home itself for Fourth Amendment purposes. Thus, courts have extended Fourth

Amendment protection to the curtilage and have defined the curtilage, as at common law, by reference to the factors that determine whether an individual reasonably can expect that an area adjacent to the home will remain private. *See Oliver v. United States*, 466 U.S. 170 (1984).

What is the law when the gate is unlocked? There are many cases that hold that *unlocked* and *unsecured* common areas of apartments are not places where a person can expect constitutional privacy. *See United States. v. Dillard,* 438 F.3d 675, 683-84 (6th Cir. 2006).

What happens when the citizen shares a *locked* gate with other individuals? May the police sneak past the locked gate to roam within the castle at will? Fortunately, many courts have held that police intrusion upon the *locked* common areas of an apartment building violates the expectation of privacy of the residents even before the officers get to the front door of the individual apartments. *See infra* at p. 20. Unfortunately, not all jurisdictions – such as Tennessee – extend the Fourth Amendment to shared dwellings.

The leading case regarding intrusion into a *locked* common area is *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976), where the officers went to the defendant's apartment building which had a locked front entrance to the common area. The doors to both the front and the back of the building were locked and could only be opened by key or by someone

within activating a buzzer system. The officer waited until a workman walked out through the door and, before the door closed, the officers slipped into the building. The officers then went up to the defendant's apartment. A search warrant was later obtained. The district court found that the officers' entry into the building and their search for the defendant in the common area of the building did not violate the defendant's reasonable expectation of privacy. The appellate court reversed:

> Whether the officer entered forcibly through a landlady's window or by guile through a normally locked entrance door, there can be no difference in the tenant's subjective expectation of privacy, and no difference in the degree of privacy that the Fourth Amendment protects. A tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers. . . . Under the circumstances, we believe that the government agent violated the Fourth Amendment by entering an apartment building, and that entry was not legally permissible because probable cause did not exist for the arrest of [the defendant].

Id. at 551, 554.

Many other courts have held that where the door to an apartment building is locked, the residents have a reasonable expectation of privacy in the common areas of the apartment building. *See, e.g.*, *People v. Trull*, 380 N.E.2d 1169, 1172 (Ill. App. Ct. 1978)

(holding that "the common entries and hallways of a locked apartment building are protected by the Fourth Amendment"); *State v. Di Bartolo*, 276 So.2d 291, 294 (La. 1973) (holding that there was a reasonable expectation of privacy inside an apartment building because "apparently the building was kept locked and only tenants who had keys and guests whom they admitted could gain entrance to the building"); *Garrison v. State*, 345 A.2d 86 (Md. Ct. Spec. App. 1975) (holding that initial entry into an apartment building was unconstitutional where "the entrance door was kept locked and only tenants and management personnel had keys to the door," and the "only way one visiting a tenant could gain entrance was by telephoning a tenant who 'would come down' and unlock the door"); *People v. Beachman*, 296 N.W.2d 305 (Mich. Ct. App. 1980) (holding that Fourth Amendment protections extend to lobby of locked residential hotel). *Titus v. State*, 696 So.2d 1257, 1267 (Fla. App. 1997) (people may allow neighbors into kitchens within their homes without connoting thereby any general invitation to police); *Logan v. Commonwealth*, 622 S.E.2d 771 (Va. App. 2005) (defendant had reasonable expectation of privacy in stairs and hallway of rooming house where he lived as to implicate his right of protection against unreasonable searches and seizures). All these cases turn on the proposition that the resident has a reasonable expectation of privacy in the *locked* common area of the apartment. *See* Sean M. Lewis, Note, *The Fourth Amendment In The Hallway: Do Tenants Have A Constitutionally Protected Privacy*

Interest In The Locked Common Areas Of Their Apartment Buildings?, 101 Mich. L. Rev. 273 (2002).

Even the seemingly contrary cases inquire if the front entry was secured: "Whether the door to the building is locked is another relevant consideration. . . . There was nothing to prevent anyone and everyone who wanted to do so from walking in the *unlocked* door and wandering freely about the premises." *United States v. Miravalles*, 280 F.3d 1328, 1332-33 (11th Cir. 2002) (emphasis added).[1] For an excellent discussion which harmonizes Sixth Circuit precedent with other circuits, see *United States. v. Dillard*, 438 F.3d 675, 683-84 (6th Cir. 2006).

The Tennessee Supreme Court articulated the following factors relevant to the expectation of privacy for its "totality of the circumstances" approach:

> (1) [whether the defendant owns the property seized]; (2) whether the defendant has a possessory interest in the thing seized;

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[1] In determining an expectation of privacy, *United States v. Miravalles* noted that a court should also inquire as to the number of people who live in the building: the more people "the less reasonable any expectation of privacy." *Id.* at 1332. This analysis is reminiscent of Abraham's negotiations with the Almighty as to the number of righteous men who might be found in Sodom and Gomorra. Where does one draw the line? (God drew it at a minimum of 10). If a shared home is to have a bright-line rule, a front locked door is certainly a solid sign rather than counting the number of units in the building (which in our case would be 21 – and thus not subject to the Wrath of God).

> (3) whether the defendant has a possessory interest in the place searched; (4) whether he has the right to exclude others from that place; (5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion; (6) whether he took normal precautions to maintain his privacy; and (7) whether he was legitimately on the premises.

State v. Tulley, 307 S.W.3d 723, 731, App. 14 (quoting *United States v. Haydel*, 649 F.2d 1152, 1154-55 (5th Cir. 1981)) (citation omitted). In contrast, this Court has held that whether a defendant's expectation of privacy is legitimate has only two components: (1) whether the defendant had a subjective expectation of privacy and (2) whether that expectation is one that society is prepared to recognize is reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *See also Kyllo v. United States*, 533 U.S. 27, 34 (2001) ("While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes – the prototypical and hence most commonly litigated area of protected privacy – there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.").

The Tennessee Supreme Court thought it relevant – and an additional favorable factor for the State – that an unknown, "casually dressed" man allowed the officers entry into petitioner's condominium while they were waiting for the private entry code from the police dispatcher. App. 19. There is no evidence as to who this individual might have been or whether he had any legitimate connection with the property whatsoever, which is a required element of apparent authority to permit entry. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990) ("As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists." (citation omitted)). If the surrounding circumstances make the consenting third party's apparent authority questionable, the officer has a duty to inquire further as to the third party's authority. *See Montville v. Lewis*, 87 F.3d 900, 903 (7th Cir. 1996). Here there was no inquiry at all of the unknown consenting party and thus there was no apparent authority to permit the officers access to the building. Indeed, for all we know the man could have been a casually dressed thief who would have been all too happy to have allowed the police to enter while he made good his escape.

The Tennessee Supreme Court's holding here would permit officers to constitutionally enter any locked dwelling based on the fact that some unknown person exited the dwelling, thereby allowing officers a means of entrance. To follow this reasoning would stretch this Court's "apparent authority" doctrine beyond its limited scope and transform the rule into "imagined authority." No jurisdiction has adopted such an extreme proposition and this Court should reject this notion out of hand.

It is difficult to conceive of what more petitioner could have done to exhibit an expectation of privacy in the front door of the condominium itself. It was locked. It had a very visible burglar alarm, App. 68, which is the urban equivalent of a "no trespassing sign." Entry was controlled by an access device which could be used by a person announcing themselves to the occupant (a device which the police purposefully circumvented). The front door, from all appearances, could have just as easily been his personal front door. The fact that petitioner shared that locked front door with several other individuals who owned condominiums jointly with him does not diminish his expectation of privacy.

The ultimate test of course is whether petitioner's subjective expectation of privacy in the locked entrance to his condominium was one that society is prepared to recognize as reasonable. We live in an urban society. A large percentage of our population lives in gated communities or locked condominiums which permit access only from afar. Do we really

want to have police officers physically trespass within private, limited-access buildings in hopes of finding contraband or other evidence of wrongdoing? The privacy and security interests an individual enjoys in those areas close to the home do not vanish simply because that person lives in a condominium with locked, secured points of entry.

Where apartments have open and unsecured common areas the police should be able to use these walkways precisely as they may use the path to the front door of a single family residence. However, when the police come upon a locked, secured front door leading to a common area of a condominium then this is no different than the secured, fenced-in area of a residence or farm not otherwise open to the public at large.

Society is prepared to accept as reasonable the owner's expectation of privacy in the closed area whether it is a single family dwelling or a multiple family condominium protected by a locked, secured door and, in our case, protected by a burglar alarm to guard against unauthorized entry. *See United States v. Dunn*, 480 U.S. 294, 301 (1987) (addressing factors to be considered in determining whether an area in question is within the curtilage of the home, including the proximity of the area to the home; whether the area is included within an enclosure surrounding the home; the nature of the uses to which the area is put; and the steps taken by the resident to protect the area from observation by people passing by).

The fallacy in the Tennessee Supreme Court's assessment of the Fourth Amendment was in weighing the number of people who could gain admittance to the condominium. Unless the front door was always open to any passerby, petitioner and the other twenty residents enjoyed an expectation of privacy in the closed, common areas by their ability to *exclude* given the locked front door and the limited coded access. Although one's home is a castle, it need not be fortified by extraordinary means for the Fourth Amendment to apply.

The entry into the locked common area of petitioner's condominium was unlawful and, in the words of the Fourth Amendment, clearly "unreasonable." It is virtually impossible to contest the judge's factual finding (in part, as follows) that the officers had no authority to enter the condominium building:

> The area between the entrance of the condominium building and the defendant's condominium door is within the curtilage of his home, and is protected from warrantless entry by the Fourth Amendment. This area was used in the daily operation of the premises. It is the entrance used by all the residents and delivery personnel. In order for any person other than a resident to gain entry, they must be buzzed in or in possession of an entry code and thus authorized to enter the building. The threshold of the defendant's door extends to the entrance of the condominium building. The pathway that leads from the sidewalk to the front of the

condominium building is for use by the public when conducting legitimate business. The detectives lawfully used the pathway leading to the condominium building's entrance. When the officers arrived outside the building's front entrance, they should have attempted to gain consent to enter the condominium premises in order to conduct the "knock and talk". A "knock and talk" is a consensual encounter and the detectives could have been authorized or refused entry at the front door of the condominium. . . .

The defendant has a subjective expectation of privacy in the area between the entrance to the condominium building and the door to his condominium unit. Unlike an apartment tenant, a condominium owner has a property interest in the building. There is a security buzzer at the entrance to the building and persons other than residents need express authorization to enter. Express authorization is given by being buzzed in or by being given the access code. The security buzzer system allows residents to determine the amount of accessibility the general public has to individual condominium units. This expectation of privacy is reasonable for the security and privacy of condominium owners.

The detectives did not have probable cause or exigent circumstances to enter the premises without a warrant. The detectives were on the premises to conduct a "knock and talk". The officers had something less than probable cause and reasonable suspicion to

> engage in this consensual encounter. There were not exigent circumstances at the time of the entry and officers did not claim exigent circumstances existed to justify the warrantless entry. The state argued the detectives' entrance was lawfully obtained by consent given by a person leaving the building as they were entering. It is unknown who held the door open for the officers to enter; the person may have been a resident, guest, or trespasser. This uncertainty is not the equivalent of express authorization. The detectives' entry was an unreasonable departure from an area where the public is impliedly invited and an intrusion upon a constitutionally protected expectation of privacy.

App. 52-54.

It is apparent that the federal and state courts of last resort are divided as to the extent with which shared dwellings enjoy expectations of privacy in common areas owned by all the residents. Cases cited earlier in this petition and those from a multitude of jurisdictions condemn the entry into private common areas. *Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions*, 15 A.L.R.6th 515. Contrary cases are canvassed by the Tennessee Supreme Court.

The primary reason this Court should grant certiorari is to resolve what constitutes a "reasonable," warrantless search of common areas of shared dwellings. The Tennessee Supreme Court's opinion and

others like it are intolerable in a free society and render useless the protections of the Fourth Amendment to those of us who choose to live in shared accommodations with others. As our cities and communities become more crowded our privacy becomes more precious and should not be surrendered to police activity such as that found here.

The State will argue that certiorari should be denied because, even if the entry into the building was unlawful, the petitioner's girlfriend consented to the entry of the interior dwelling. When a claim of a consensual search is preceded by illegal police action under the Fourth Amendment, the government must not only show the voluntariness of the subsequent consent under the totality of the circumstances, but must also establish a break in the illegal action and the evidence subsequently obtained under the so-called "fruit of the poisonous tree" doctrine. *United States v. Melendez-Garcia*, 28 F.3d 1046, 1053 (10th Cir. 1994). *See* Wayne LaFave, 4 SEARCH AND SEIZURE § 8.2(d) (4th ed. 2004). While the two tests overlap, they can produce different results and must be considered independently. *State v. Reinier*, 628 N.W.2d 460, 467-68, n.3 (Iowa 2001) ("The illegal action by the police in entering the porch during the 'knock and talk' procedure actually requires a dual analysis.").

The government must show any taint from the illegal search has been purged or attenuated not only because of the possible effect on the voluntariness of the defendant's consent, but also to effectuate the exclusionary rule. *Melendez-Garcia*, 28 F.3d at 1054.

Where the initial "knock and talk" is conducted unlawfully the courts routinely suppress the evidence even where there is a later search warrant. *See Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008).

The attenuation analysis is a separate inquiry from the voluntariness of the consent since, while the voluntariness of the consent focuses on the behavior or state of mind of the person doing the "consenting," the attenuation inquiry instead focuses on the behavior or state of mind of the police. *See United States v. Delancy*, 502 F.3d 1297, 1308 (11th Cir. 2007):

> The final factor is the purpose and flagrancy of the official conduct. This factor is also the most straightforward, and here, the most important one. If the police entry had been made for the purpose of gaining consent to conduct a full scale search, we would be bound to find the consent tainted. Indeed, when the police act with the express purpose of exploiting an illegal action, the causation is so obvious that no real attenuation analysis is even necessary.

Recall the testimony of Officer Simonik: "[O]ur main objective is try to get inside that residence, and gain consent to search that residence. . . . Because I wanted to come inside and talk, to see if there was anything in plain view, where I could obtain a search warrant."

Given the gravity of the violation here, the only appropriate remedy is the suppression of all the evidence under the full weight of the exclusionary rule, which was designed to enforce the right of privacy. *Mapp v. Ohio,* 367 U.S. 643 (1961). To do otherwise would promote these "knock and talks" even where the officers violate accepted bright-line boundaries. *Keenom v. State*, 80 S.W.3d 743, 747 (Ark. 2002) ("In our review of federal appellate court decisions holding that the "knock and talk" procedure is not *per se* violative of the Fourth Amendment, we also noted a word of warning: 'police must realize the inherent limitations in the more informal way of proceeding.'" (citation omitted)).

The elusive privacy test articulated and applied by the Tennessee Supreme Court – in conjunction with the adoption of apparent authority of unknown persons to permit the police entry into a building – is inconsistent with the Fourth Amendment. The line drawn by the Fourth Amendment is not made of sand but of stone. This Court should grant certiorari.

B. There Are No Jurisdictional Impediments to Deciding the Question Presented.

The State will argue that this Court has no "jurisdiction" ostensibly because the opinion of the Tennessee Supreme Court is not a "final decision," since the matter was remanded for trial. Under Tennessee law the trial and appellate courts may entertain an interlocutory appeal of a matter wholly

dispositive of the case. The Court of Criminal Appeals found the search question dispositive, App. 42, as did the Tennessee Supreme Court.

This case is "final" for two reasons: the Tennessee law of the case doctrine and the State's stipulation below that the issue was determinative of the entire case and that no further evidence was available other than that obtained through the search. As to the latter proposition, the parties stipulated in the trial court: *"That all of the proof and evidence which the State intends to introduce in the trial was derived from the various searches as was testified by the officer at the suppression hearing."* Thus, the State conceded that the lawfulness of the evidence secured by the several searches was dispositive of the entire case.

Had the Tennessee courts held that the evidence secured from the resulting searches be suppressed, the indictment would have been dismissed since there was *no* other proof which would be adduced at trial *except* that derived from the contested searches as the state stipulated below. *See State v. Phillips*, 30 S.W.3d 372, 377 (Tenn. Crim. App. 2000) ("Based upon the state's representation to the trial court and this Court that the state may not proceed with further prosecution absent the defendant's pretrial statement, the indictment is DISMISSED."); *State v. Harris*, 919 S.W.2d 619, 625 (Tenn. Crim. App. 1995) ("The marijuana plants which were seized as a result of that search and any statements or other fruits resulting from this constitutional infirmity must be suppressed.

The judgment of the trial court is reversed. Since this question is dispositive of the case, the convictions . . . are set aside and the charges against them are dismissed."); *State v. Richards*, 286 S.W.3d 873, 882 (Tenn. 2009) ("Accordingly, the judgment of the Court of Criminal Appeals *dismissing the indictment* [because the search is unlawful and constituted all the evidence against the defendant] is affirmed." (emphasis added)); *State v. Dailey*, 273 S.W.3d 94, 113 (Tenn. 2009) ("[Because the confession was unlawfully taken and was the only evidence of the defendant's guilt, the] judgment of the Court of Criminal Appeals is reversed, the Defendant's conviction is vacated, and the *charge against the Defendant is dismissed*." (emphasis added); *State v. Day*, 263 S.W.3d 891, 897 (Tenn. 2008) ("[Because the search was unlawful and produced the only evidence against the defendant] the Court of Criminal Appeals reversed the judgment of the trial court and *dismissed the indictments*" (emphasis added)); *State v. Bobadilla*, 181 S.W.3d 641, 642 (Tenn. 2005) ("In our painstaking review of the record, we have determined that the search warrant was not issued in accordance with the requirements of the Tennessee Rules of Criminal Procedure, specifically Rule 41(c). Thus, we hold the search conducted pursuant to the warrant unreasonable and the evidence obtained as a result inadmissible. Accordingly, the judgment of the Court of Criminal Appeals, affirming the trial court's judgment on other grounds is reversed, and *the indictment* [for possession of contraband and drug paraphernalia] *in this case is dismissed*." (emphasis added)). Thus, a reversal of the

federal Fourth Amendment issue by this Court will terminate this prosecution given the posture of the case.

As to the "law of the case" doctrine, finality is absolutely certain here since the Tennessee Supreme Court ruled conclusively on the Fourth Amendment question which is dispositive of the entire case. Particularly since the decision below is by the highest court of Tennessee, no Tennessee court can or will reconsider this issue. *See Memphis Publishing Co. v. Tennessee Petroleum*, 975 S.W.2d 303 (Tenn. 1998).

Thus, this case is absolutely final since a reversal by this Court on the federal issue (which is the only issue) would be preclusive of any further litigation on the cause of action below. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975) ("In [this] category are those cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final."). The same would be true had the Tennessee Supreme Court found the search unlawful and it were the State who desired review here. *New York v. Quarles*, 467 U.S. 649, 651, n.1 (1984) "Although [the accused] has yet to be tried in state court, the suppression ruling challenged herein is a 'final judgment'. . . .").

Alternatively, the State will assert that this Court could review this issue later following petitioner's conviction. It is true that a state court's ruling on an issue raised via interlocutory appeal does not cut off an appellant's right to later have the issue reviewed by this Court. *Pennsylvania v. Ritchie*, 480 U.S. 39, 47-51 (1987). It is clear, though, that in a state court context, petitioner would be precluded from re-litigating this issue on direct appeal following a conviction. *See State v. Jefferson*, 31 S.W.3d 558, 560-61 (Tenn. 2000); *State v. Carter*, 970 S.W.2d 509 (Tenn. Crim. App. 1997) (involving a direct appeal following an interlocutory appeal). Similarly, collateral estoppel precludes further state court remedies. *See State v. Thompson*, 285 S.W.3d 840 (Tenn. 2009); *State v. Scarborough*, 181 S.W.3d 650 (Tenn. 2005). Even though case law suggests that this Court may review this issue later, there are no legal or jurisdictional prohibitions to a review now given that there are no further factual and legal proceedings which remain on the dispositive Fourth Amendment issue. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 722-23, n.28 (1974) ("This Court has been inclined to follow a 'pragmatic approach' to the question of finality") (citation omitted).

The Fourth Amendment search question presented here is literally the "entire case." Should this Court grant certiorari and reverse the Tennessee Supreme Court, the prosecution of the petitioner

would be at an end; the decision below could not be more final and thus this Court has jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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307 S.W.3d 723

Supreme Court of Tennessee,
at Nashville.
STATE of Tennessee
v.
William Glenn TALLEY.

No. M2007-01905-SC-R11-CD.

Feb. 11, 2010 Session.
March 19, 2010.

David Louis Raybin, Nashville, Tennessee, for the appellant, William Glenn Talley.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; Mark A. Fulks, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Deborah Housel, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

GARY R. WADE, delivered the opinion of the Court, in which JANICE M. HOLDER, C.J., CORNELIA A. CLARK, WILLIAM C. KOCH, JR., and SHARON G. LEE, JJ., joined.

GARY R. WADE, J.

After receiving information about illegal drug sales at the condominium residence of the defendant, detectives from the police department, which, among others, had been previously provided with the access

code to the locked front entrance of the building, were permitted entry into the commonly owned interior hallway by an unknown individual. The detectives knocked at the defendant's unit, received consent to search from the girlfriend of the defendant, and observed what appeared to be drugs and drug paraphernalia. After search warrants were issued, first for the defendant's residence and then for his business, the police found drugs and child pornography; further, the defendant, upon questioning, made incriminatory statements. A grand jury indicted the defendant on six separate charges. The trial court denied a motion to suppress the evidence acquired by the police and then granted the defendant an interlocutory appeal. The Court of Criminal Appeals affirmed. We granted an application for permission to appeal in order to determine whether the defendant had a legitimate expectation of privacy in the locked, commonly shared interior hallway of the condominium. Because the totality of the circumstances establish that the defendant could not reasonably expect privacy in the hallway leading to his residential unit, the order denying the motion to suppress is affirmed and the cause is remanded for trial.

Factual and Procedural History

During the summer of 2005, William Glenn Talley (the "Defendant") resided in a condominium unit he owned on the second floor of Hedrick Place, located at 116 31st Avenue North in Nashville. Including the Defendant, there were twenty-one owners of units

within the condominium building. Ownership of a unit included a parking space and an equal share in the common areas, such as the interior hallways, the stairway, and yard. The property did not display "no trespassing" signs. The front door entrance, accessible from the public sidewalk, was locked at all times, requiring visitors without an access code to make contact with a resident by use of an electronic keypad and the telephone system in order to gain entry. The unit resident permitting entry either provided the visitor with an access code via the telephone system or simply opened the front door manually. Any resident or guest could admit anyone, including the police, to the common areas of the building. Those entering the front door had access to all of the common areas. The police department, the fire department, the postal service, United Parcel Service, FedEx, facility cleaners, vendors, and perhaps others were provided with an access code to the front entrance. The dispatcher at the police department maintained the code on file so that officers could call in for access at any time.

On or about August 11, 2005, an individual who expressed the desire to remain anonymous reported to the Metropolitan Nashville Police Department through "244-DOPE-LINE" that the Defendant was selling illegal drugs at his condominium unit.[1] Five

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[1] Detective Simonik acknowledged that the caller actually provided his or her identity but had requested confidentiality.

days later, at approximately 7:45 p.m., Detective Joseph Simonik, accompanied by Detectives Fox, Osborne, Stokes, and Gonzales, arrived at the condominium building and contacted the dispatcher in order to obtain the access code for the front door. The detectives, who had purposefully chosen not to alert the Defendant of their presence before they reached his unit, wore "raid jackets" clearly marked with a police patch and badge. While the officers waited for the dispatcher to provide the code, a casually dressed man, who was departing the premises, opened the door, greeted the officers, and allowed them entry. Detectives Simonik, Fox, and Osborne proceeded to the Defendant's second floor unit, and Detectives Stokes and Gonzales waited in the hallway. Within thirty to forty seconds after entering the building, Detective Simonik knocked at the door of the Defendant's unit. Kimberly Knight answered and informed the officers that the Defendant was not present. Detective Simonik asked permission to enter the unit in order to talk further, and Ms. Knight, who told the officers that she had shared the residence with the Defendant for approximately three weeks, agreed. As the detectives walked into the living room, they observed, in plain view, a glass smoking pipe and a knife containing white residue.

Shane Cathey, Ms. Knight's teenage brother, had been staying at the condominium and was present when the detectives arrived. When questioned by Detective Fox, Cathey admitted that he had possession of Xanax, which had been supplied by the Defendant.

Drugs were in his pocket. Ms. Knight called the Defendant on her mobile phone and allowed Detective Simonik to speak directly to him. After explaining the purpose of the investigation, Detective Simonik asked the Defendant, a licensed pharmacist, to return to the condominium. When the Defendant arrived shortly thereafter, the detective asked for permission to search. At that point, the Defendant asked for the opportunity to speak to an attorney, made several telephone calls, and then walked upstairs in hopes of finding an attorney who resided in one of the other condominium units. Ultimately, he declined consent to search. Detective Simonik left to acquire a search warrant, and the other officers secured the area until his return. Meanwhile, the Defendant was informed that he was free to leave the premises.

After a search warrant was obtained, the officers conducted a search of the unit at approximately 10:15 p.m. They discovered more illegal drugs, drug paraphernalia, pornographic images of children, and three pornographic compact discs.[2] When Ms. Knight

[2] In the course of their investigation at the condominium, the police seized the following items: a folding knife with white residue; a white cup with residue; a glass vial with copper mesh; a glass vial with residue; a glass pipe with dark residue; three straws with white residue; four plastic bags with white residue; a mirror with white residue; another marijuana pipe; two sets of digital scales; a bag containing plastic baggies; a plastic cocaine sniffer; a black and silver pipe; a set of glass pipes with residue; a metal grinder for marijuana; two plastic bags of marijuana; two bags of Xanax; a pill bottle of Hydrocodone; various pill bottles containing 1,928 Xanax pills, 115 Mersyndol pills, 1,198

(Continued on following page)

informed Detective Simonik that the Defendant had other drugs and a gun at his place of business, the officers applied for a search warrant at that location. The second warrant was issued at 2:59 a.m. on the following day. Two hours later, the officers found more illegal drugs, a gun, and a large number of pornographic images of children at the Defendant's place of business. When arrested, the Defendant admitted to having used cocaine since the prior September and acknowledged that he had provided illegal drugs to some of his friends in exchange for money, explaining that he did not consider this to be "selling." He also asserted that he had downloaded the images the detectives found on his computer only out of curiosity.

Based upon the results of the investigation, the Defendant was indicted by a grand jury on six counts: (1) exploitation of a minor by possessing more than fifty images of child pornography; (2) sexual exploitation of a minor by possessing more than one-hundred images of child pornography; (3) possession of dihydrocodeinone with intent to sell or deliver; (4) possession of alprazolam with intent to sell or deliver; (5) possession of clonazepan with intent to sell or deliver; and (6) possession of diphenoxylate with intent to sell or deliver. *See* Tenn.Code Ann. §§ 39-17-1003 & -417 (2003).

Lomotil pills, and nine Klonopin pills; a Dell notebook computer containing images of child pornography; three pornographic compact discs; and several other compact discs. Child pornography was also found in the Defendant's briefcase.

The Defendant filed a motion to suppress all of the incriminating evidence acquired by the police, contending that the condominium search was illegal and arguing that the search of the business and any of his incriminatory statements were unattenuated products of the wrongful search. Charles Reasor, Jr., an attorney and homeowners association board member who owned a unit at Hedrick Place, testified for the Defendant at the hearing on the motion. When asked whether he considered the access code given to various nonresidents an "emergency code" for the police, he answered yes. When asked whether the police had been allowed "free rei[ ]n" into the building absent an emergency, Reasor answered, "No." On further questioning, however, he conceded that the police "could have access, if they wanted to know the code" and that they had been there in non-emergency situations, such as for the preparation of an automobile accident report and a burglary investigation. Further, Reasor acknowledged that the code had "just been registered with the police department, just like it has with the postal service," and the use of the code by the police was "at their discretion."

After concluding from this testimony that the Defendant had a reasonable expectation of privacy in the hallway leading to his condominium unit door, an area "protected from warrantless entry," and the officers had gained entry in order to conduct a "knock and talk," *see United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir.2000), the trial court observed that the motion to suppress would have been granted absent

the intervening consent to search by Kimberly Knight. *See State v. Cothran*, 115 S.W.3d 513, 521 (Tenn.Crim.App.2003) (upholding a "knock and talk" as a proper investigatory technique in a consensual encounter). The trial court refused to rule out the evidence after finding that the consent by Ms. Knight, as a lawful occupant of the unit, was not causally linked to the illegal intrusion. In the interlocutory appeal, the Court of Criminal Appeals affirmed, but on different grounds, concluding that the Defendant had no reasonable expectation to privacy in the common areas of the condominium complex. *State v. Talley*, No. M2007-01905-CCA-R9-CD, 2009 WL 1910949, at *6 (Tenn.Crim.App. July 1, 2009). In anticipation of this Court's further review, the Court of Criminal Appeals alternatively ruled that had the Defendant reasonably expected privacy in the hallway and had the initial entry, therefore, been unlawful, the State failed to establish that the consent by Ms. Knight was sufficiently removed from the illegality so as to permit the admission of the evidence acquired. *Id.* at *7.

This Court granted the application for permission to appeal in order to address whether the Defendant had a reasonable expectation of privacy in the commonly owned hallway of the condominium complex. If not, the motion to suppress was properly denied, and the alternative theories advanced by the State would not warrant consideration.

Standard of Review

The standard of review applicable to suppression issues is well-established. When the trial court makes findings of fact at the conclusion of a suppression hearing, the findings are binding upon this Court unless the evidence in the record preponderates against them. *State v. Odom,* 928 S.W.2d 18, 23 (Tenn.1996). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Id.* "The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *Id.* Our review of a trial court's application of law to the facts, however, is de novo, with no presumption of correctness. *See State v. Walton,* 41 S.W.3d 75, 81 (Tenn.2001) (citing *State v. Crutcher,* 989 S.W.2d 295, 299 (Tenn.1999); *State v. Yeargan,* 958 S.W.2d 626, 629 (Tenn.1997)).

Applicable Law

Both the federal and state constitutions offer protection from unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered subject to suppression. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated. . . ."); Tenn. Const. art. I, § 7 ("That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures. . . ."). "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)); *see also State v. Bridges*, 963 S.W.2d 487, 490 (Tenn.1997) ("[A] warrantless search or seizure is presumed unreasonable."). The Fourth Amendment and article I, section 7 of our constitution protect the curtilage, which is defined as any area adjacent to a residence in which an individual can reasonably expect privacy. *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). Intrusion within the curtilage, as an area of expected privacy, may be unlawful. *State v. Prier*, 725 S.W.2d 667, 671 (Tenn.1987). Exceptions to the warrant requirement include searches incident to arrest, plain view, exigent circumstances, and others, such as the consent to search. *State v. Cox*, 171 S.W.3d 174, 179 (Tenn.2005). Reasonableness is the "touchstone of the Fourth Amendment." *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991) (citing *Katz*, 389 U.S. at 360, 88 S.Ct. 507); *see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S.Ct.

1402, 103 L.Ed.2d 639 (1989); *State v. Scarborough*, 201 S.W.3d 607, 616 (Tenn.2006). These constitutional protections are designed to "'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" *State v. Keith*, 978 S.W.2d 861, 865 (Tenn.1998) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)).

This Court has previously held that our state constitution offers more protection than the corresponding provisions of the Fourth Amendment. *See, e.g., State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn.1989); *State v. Lakin*, 588 S.W.2d 544, 549 (Tenn.1979). As under the federal constitution, evidence obtained as a result of a warrantless search or seizure "is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *Yeargan*, 958 S.W.2d at 629. The state, of course, "bears the burden of proof when a search or seizure is conducted without a warrant." *State v. Bernos*, 235 S.W.3d 99, 105 (Tenn.2007) (citing *Yeargan*, 958 S.W.2d at 629).

Neither the Fourth Amendment nor article 1, section 7 of our constitution precludes governmental intrusion absent the reasonable expectation of privacy. *See Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993); *State v. Munn*, 56 S.W.3d 486, 494 (Tenn.2001). In consequence, "an investigation by governmental authorities which is not a search as defined by the Supreme Court may be

conducted without probable cause, reasonable suspicion or a search warrant." *State v. Bell*, 832 S.W.2d 583, 589-90 (Tenn.Crim.App.1991). The "rights assured by the Fourth Amendment are personal rights, and . . . they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S. 377, 389, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). The focus of the inquiry is "on the extent of a particular defendant's rights under the [constitution], rather than on any theoretically separate, but invariably intertwined concept of standing." *Rakas v. Illinois*, 439 U.S. 128, 139, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

In the determination of whether a search or seizure meets constitutional standards, the first consideration, therefore, is whether the accused has a reasonable expectation of privacy. *See Katz*, 389 U.S. at 360, 88 S.Ct. 507 (Harlan, J., concurring). In *Katz*, a two-prong test was established: "(1) whether the individual had an actual, subjective expectation of privacy and (2) whether society is willing to view the individual's subjective expectation of privacy as reasonable and justifiable under the circumstances." *Munn*, 56 S.W.3d at 494 (citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)). A defendant has the initial burden of establishing a legitimate expectation of privacy, and the failure to do so is dispositive in favor of the state. *E.g.*, *State v. Oody*, 823 S.W.2d 554, 560 (Tenn.Crim.App.1991).

Analysis

In this instance, the Defendant argues that this Court should adopt a bright-line rule precluding the police from entering the locked common area of a privately owned condominium building, apartment complex, or similar multi-unit dwelling, and, therefore, overturn the ruling of the Court of Criminal Appeals. In response, the State asserts that the Defendant had no reasonable expectation of privacy in the interior hallways of the condominium complex, and, further, that the police had authority to enter based upon consent not only by virtue of their having been provided the entry code by the condominium ownership but also by permission of the individual who had held open the front entrance door for the detectives participating in the investigation.

Our decision in *State v. Ross*, 49 S.W.3d 833 (Tenn.2001), addresses the expectation of privacy issue in the context of the Fourth Amendment and article 1, section 7 of the Tennessee Constitution. In that case, this Court considered a challenge by the occupants of a motel to a warrantless search by the police and discussed at length the state's contention that Ross, who, in response to questioning by the authorities at the scene, had disclaimed any interest in the motel unit, had no reasonable expectation of privacy. After observing that the federal and state constitutions afforded privacy protections to the resident of a hotel or motel room, this Court recognized a totality of the circumstances test, applying the seven factors developed in *United States v. Haydel*, 649 F.2d

1152 (5th Cir.1981), but also carved out an exception, holding that when a defendant disclaims any interest in the object of a governmental search, the expectation of privacy is lost. *Ross*, 49 S.W.3d at 840-42. Absent the disclaimer exception, this Court approved of the following factors:

> (1) [whether the defendant owns the property seized]; (2) whether the defendant has a possessory interest in the thing seized; (3) whether the defendant has a possessory interest in the place searched; (4) whether he has the right to exclude others from that place; (5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion; (6) whether he took normal precautions to maintain his privacy; and (7) whether he was legitimately on the premises.

Id. at 841 (quoting *Haydel*, 649 F.2d at 1154-55). The Court of Criminal Appeals first used this test in *State v. Turnbill*, 640 S.W.2d 40, 46 (Tenn.Crim.App.1982), and has often resorted to the use of these factors when considering the legitimacy of a privacy claim. *See, e.g., Oody*, 823 S.W.2d at 560; *State v. Woods*, 806 S.W.2d 205, 208 (Tenn.Crim.App.1990).

In this instance, the Defendant, properly asserting that a condominium complex is analogous to an apartment building, specifically asks this court to follow the ruling in *United States v. Carriger*, 541 F.2d 545 (6th Cir.1976), a decision in which the United States Court of Appeals for the Sixth Circuit

considered "whether a tenant in an apartment building has a reasonable expectation of privacy in the common areas . . . not open to the general public." *Id.* at 549. In *Carriger,* a federal agent gained entry to a locked interior corridor of an apartment building by preventing the door from closing as several workers exited the premises. *Id.* at 548. The Sixth Circuit fashioned a rule that when "an officer enters a locked [apartment] building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed." *Id.* at 552. The rationale for the decision was that a tenant in a locked apartment building, much like the circumstances here involving a locked but shared condominium hallway, has an expectation that only other building residents or their invited guests would have access to the common areas. *Id.* at 551; *see also United States v. Heath,* 259 F.3d 522, 534 (6th Cir.2001) (determining that evidence seized in the defendant's apartment unit must be suppressed, even though a co-resident consented to the search, because of the expectation of privacy in a hallway with a locked entrance).[3] Illinois, Louisiana, Michigan, and perhaps other state courts appear to concur in the

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[3] In contrast, a walkway leading from a public sidewalk or street to the front door of the residence "represents an implied invitation to the general public to use the walkway for purpose of pursuing legitimate social or business interests" and is not protected by the Fourth Amendment or article 1, section 7 of the Tennessee Constitution. *State v. Harris,* 919 S.W.2d 619, 623-24 (Tenn.Crim.App.1995).

rule established in the Sixth Circuit. *See, e.g., People v. Trull,* 64 Ill.App.3d 385, 20 Ill.Dec. 960, 380 N.E.2d 1169, 1173 (1978); *State v. Di Bartolo,* 276 So.2d 291, 294 (La.1973); *People v. Killebrew,* 76 Mich.App. 215, 256 N.W.2d 581, 583 (1977). Our research, however, establishes that the Sixth Circuit represents the minority view among the federal circuit courts of appeal that have addressed the issue.

In *United States v. Eisler,* 567 F.2d 814 (8th Cir.1977), the Eighth Circuit, only a year after the *Carriger* decision, concluded that the locks on the doors at the entrances of an apartment building were designed to provide security for the occupants, not for the common hallways.[4] Because the hallways were commonly accessible by residents, their guests, and other individuals having a legitimate reason to be on the premises, the Eighth Circuit panel concluded that the tenant in the apartment building had no reasonable expectation of privacy in that area. *Id.* at 816. Our review of the more recent cases confirms that among the federal courts of appeal, the Sixth Circuit stands alone in recognizing a reasonable expectation of privacy in the common areas of a locked apartment

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[4] As a general rule, unlocked or unsecured common areas of apartment buildings do not qualify for any reasonable expectation of privacy. *State v. Taylor,* 763 S.W.2d 756, 760 (Tenn.Crim.App.1988); *see also United States v. Luschen,* 614 F.2d 1164, 1173 (8th Cir.1980). If the hallway of a multi-unit dwelling is readily accessible to the general public, police may enter. *State v. Crider,* 341 A.2d 1, 4 (Me.1975); *see also United States v. Acosta,* 965 F.2d 1248, 1253-54 (3d Cir.1992).

building. To illustrate, in *United States v. Holland*, 755 F.2d 253 (2d Cir.1985), the Second Circuit followed the rule established in *Eisler*. Thereafter, the Seventh Circuit, *United States v. Concepcion*, 942 F.2d 1170, 1171-72 (7th Cir.1991), and the Ninth Circuit, *United States v. Nohara*, 3 F.3d 1239, 1241-42 (9th Cir.1993), followed suit. A number of other states have since adopted what now appears to be the majority position among the states which have considered the question. *See, e.g., People v. Lyles*, 332 Ill.App.3d 1, 265 Ill.Dec. 591, 772 N.E.2d 962, 966 (2002); *Commonwealth v. Dora*, 57 Mass.App.Ct. 141, 781 N.E.2d 62, 67 (2003); *State v. Davis*, 711 N.W.2d 841, 845 (Minn.Ct.App.2006); *Commonwealth v. Reed*, 851 A.2d 958, 962 (Pa.Super.Ct.2004).

In the case before us, Judge Norma M. Ogle, writing for the Court of Criminal Appeals, observed that access to the hallways of a condominium complex or an apartment building by those other than tenants would not necessarily negate a reasonable expectation of privacy, thereby rejecting the Sixth Circuit bright-line rule that a resident always has a reasonable expectation of privacy in a secured common area:

> The determination as to whether a tenant has a reasonable expectation in the common areas of a locked apartment building is a fact-driven issue. In the instant case, [condominium board member] Charles Reasor testified that owners could give their guests the access code to get into the building and that various nonresidents such as delivery

> and cleaning people used the code. *See State v. Breuer*, 577 N.W.2d 41, 46-47 (Iowa 1998) (noting as one factor in its conclusion that the defendant had a reasonable expectation of privacy in the stairway of his locked apartment building was that guests usually waited at building door after ringing doorbell). Furthermore, twenty-one condominiums were in the building. Given the numerous third parties that had unescorted access to the building's common areas, we conclude that the [defendant] in this case did not have an actual, subjective expectation of privacy in those areas.

Talley, 2009 WL 1910949, at *6 (citation omitted).

The trial court specifically found that the police dispatcher had the code number required for entry, but that while the detectives were waiting for the information to be passed along by the dispatcher, "a man leaving the condominium held the door open for the detectives to enter." Because the individual who opened the door for the officers to enter was not identified, the trial court refused to classify the entry as properly authorized by a resident.[5]

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[5] The trial court implicitly ruled that the consent by Ms. Knight was sufficiently attenuated from the illegal entry at the front door of the condominium building. In order to determine whether the causal connection between an unlawful search and seizure and a consent to search has been broken, a court should consider the following three factors set forth by the United States Supreme Court in *Brown v. Illinois*, 422 U.S. 590, 603-04, 95

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In our view, the State's failure to identify who opened the door is not dispositive on the expectation of privacy issue, but would qualify as a fact to be taken into consideration under the analysis established in *Ross*. The decision in *United States v. Miravalles*, 280 F.3d 1328, 1331-32 (11th Cir.2002), is instructive. The Eleventh Circuit Court of Appeals, while addressing the expectation of privacy question in the common areas of an apartment building, also chose to deviate from the Sixth Circuit rule, adopting instead the majority position within the federal

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S.Ct. 2254, 45 L.Ed.2d 416 (1975): "1) the temporal proximity of the illegal seizure and the consent; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct." *State v. Garcia*, 123 S.W.3d 335, 346 (Tenn.2003). The question of attenuation is subject to de novo review. *State v. Ford*, 30 S.W.3d 378, 380 (Tenn.Crim.App.2000). The state carries the initial burden of establishing sufficient attenuation. *Brown*, 422 U.S. at 604, 95 S.Ct. 2254.

Because only thirty seconds to two minutes passed between the detectives' entry through the front door of the building and the knock at the Defendant's second floor unit, the first factor was held by the Court of Criminal Appeals to have weighed against attenuation. Because there were no compelling intervening circumstances, the second factor weighed in favor of the Defendant. Because the officer initially described the informant as anonymous and later revealed that he knew the identity, the Defendant was not present, and Ms. Knight was not a suspect, the third factor was also deemed favorable for the Defendant. Thus, had the intrusion in the first instance been unlawful, the Court of Criminal Appeals would have found no basis for the application of the doctrine of attenuation. *Talley*, 2009 WL 1910949, at *7.

circuit courts of appeal while considering a variety of factors in its analysis:

> Five of the six circuits that have decided the issue have concluded that tenants do not have a reasonable expectation of privacy in the common areas of their apartment building. Of those five decisions, four necessarily suggest that it does not matter whether the door to the apartment building is locked or unlocked at the time law enforcement officers arrive, because in each of those cases the door was locked.
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> . . . .
>
> The five circuits holding that there is no reasonable expectation of privacy in the common areas of an apartment building reason that tenants have little control over those areas, which are available for the use of other tenants, friends and visitors of other tenants, the landlord, delivery people, repair workers, sales people, postal carriers and the like. *The reasonableness of a tenant's privacy expectation in the common areas of a multi-unit apartment building stands in contrast to that of a homeowner regarding the home and its surrounding area, over which the homeowner exercises greater control. The more units in the apartment building, the larger the number of tenants and visitors, workers, delivery people, and others who will have regular access to the common areas, and the less reasonable any expectation of privacy.*

> *Whether the door to the building is locked is another relevant consideration.*

Id. at 1331-32 (emphasis added) (citations omitted).

Having considered our 2001 holding in *Ross* and the developments in the federal courts of appeal since the Sixth Circuit decision in *Carriger,* we reject any bright-line rule and maintain our view that the totality of the circumstances test is best-suited for determining the reasonableness of an expectation of privacy. Application of these factors to the circumstances existing at Hedrick Place favors the State. Although the Defendant had a 1/21st ownership interest in the common areas of the building and the front entrance was locked at all times, each of the residents, according to Reasor, had the right to permit entry without restrictions. Neither the Defendant nor any other resident could unilaterally exclude others rightfully within the hallway. While the Defendant was entitled to privacy in his condominium unit, there is no evidence that he exhibited a subjective expectation that the common areas, and particularly the hallways, would be free from intermittent access by the police. To the contrary, the record establishes that the condominium residents had collectively provided not only the police department but also several others with the entry code for use in the ordinary course of their duties.[6] Police access was

[6] The Court of Criminal Appeals considered the number of residences in the condominium as a factor in the analysis of expectation of privacy, suggesting that the greater the number of

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"discretionary" and not always limited to emergencies. Moreover, there is no evidence that the Defendant had taken any precautions to maintain his privacy in the common areas of the building. The totality of these circumstances establish that the Defendant could not have had a reasonable expectation of privacy in the interior hallway between the condominium entrance and the door to his particular unit.

There being no illegality in the initial entry into the condominium building, it follows that the consent to enter the unit given by the Defendant's girlfriend, Ms. Knight, who shared his residence, is valid. In *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), the Supreme Court held that consent to a warrantless search by one who possesses common authority over the premises or effect is valid as against an absent, non-consenting person with whom that authority is shared. Common authority is defined as the "mutual use of the property by persons generally having joint access or control . . . so that it is reasonable to recognize that any of the cohabitants has the right to permit [an] inspection . . . and that the others have assumed the risk. . . ." *Id.* at 171, n. 7; *see also State v. Bartram*, 925 S.W.2d 227,

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residents, the lesser the expectation of privacy. In *United States v. King*, 227 F.3d 732, 749-50 (6th Cir.2000), the Sixth Circuit Court of Appeals recognized that principle, holding that the nature of the living arrangements in a duplex afforded a greater expectation of privacy in common areas than that which a resident of a multi-unit apartment building might enjoy.

231 (Tenn.1996) (holding that even an "angry wife" may consent to search as one with "common authority" over premises, and that such consent is valid against the opposing wishes of an absent, nonconsenting husband with whom that authority is shared). Further, neither the search warrants nor the incriminatory statements by the Defendant are tainted by the conduct of the police; therefore, the "fruit of the poisonous tree doctrine" does not apply. *See Wong Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Conclusion

Because the Defendant did not have a reasonable expectation of privacy in the commonly shared, interior hallway of a condominium complex that ran from the front entrance to his unit's doorway, the motion to suppress was properly denied. The judgment of the Court of Criminal Appeals, which upheld the trial court's refusal to grant relief, is affirmed. Costs are assessed against the Defendant, William Glenn Talley, for which execution may issue if necessary.

2009 WL 1910949 (Tenn.Crim.App.)

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
at Nashville.
STATE of Tennessee
v.
William Glenn TALLEY.

No. M2007-01905-CCA-R9-CD.

June 17, 2008 Session.
July 1, 2009.

Application for Permission to Appeal
Granted by Supreme Court Nov. 23, 2009.

Direct Appeal from the Criminal Court for Davidson County, No 2006-A-559; Monte Watkins, Judge.

David L. Raybin (at trial and on appeal) and Ed Yarbrough (at trial), Nashville, Tennessee, for the appellant, William Glenn Talley.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Deborah Housel, Assistant District Attorney General, for the appellee, State of Tennessee.

NORMA McGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

OPINION

NORMA McGEE OGLE, J.

The appellant, William Glenn Talley, was charged in the Davidson County Criminal Court with two counts of sexual exploitation of a minor and four counts of possessing a controlled substance with intent to sell or deliver. He filed pretrial motions to suppress the evidence linking him to the crimes and his statement to police, and the trial court denied the motions. From the trial court's order, the appellant brings this interlocutory appeal, arguing that the evidence and his statement were obtained in violation of his right to be free from unreasonable searches and seizures as provided by the Fourth Amendment of the United States Constitution and article I, section 7 of the Tennessee Constitution. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

I. Factual Background

The record reflects that in August 2005, the appellant lived in a condominium building on Thirty-First Avenue North in Nashville. The building's front door was always locked, and residents gained entry to the building by entering an access code into a keypad

outside the main door. On August 16, 2005, detectives went to the building after receiving a tip that the appellant was selling drugs from his condominium. When the detectives arrived and found the building's front door locked, they called their department to obtain the access code, which was on file. While waiting for the code, a man exited the building and let the detectives inside. The detectives went to the appellant's condominium on the second floor and knocked on the door. The appellant was not home, but Kimberly Knight answered the door. She told the officers she had been living in the condominium with the appellant for about three weeks, and she gave the officers permission to come inside. In plain view, the detectives saw a glass crack pipe and a knife with a white residue on it. They secured the scene and obtained a search warrant for the condominium and the appellant's place of business. Searches revealed controlled substances and child pornography at both locations. The appellant was arrested, and he stated that he was addicted to cocaine and that he exchanged pills with his friends for money. Subsequently, the appellant filed motions to suppress the evidence and his statement. In pertinent part, he claimed in the motions that the evidence and the statement resulted from an unlawful search because the detectives gained warrantless, unreasonable entry to the private condominium building.

At the hearing on the motions, Charles B. Reasor testified that he owned a condominium on the third floor and that the appellant owned a unit on the

second floor. Twenty-one condominiums were in the building, and each owner owned their individual condominium and one twenty-first (1/21) of all the building's common areas such as the hallways, stairs, and the outside yard. Reasor stated that a person gained access into the building from the keypad at the locked front door. A guest could push the "pound sign" on the keypad to find a condominium owner's name. Once the guest found the owner's name, the guest could call the owner's condominium telephone. The owner could give the guest the access code to get into the front door or the owner could come to the front door and let the guest into the building.

Reasor testified that the fire department, the police department, the United Postal Service, FedEx, vendors, the cleaning service, and "people who need[ed] to have access" had the access code. He described the code as a "general number" but acknowledged that it was considered an "emergency code." He stated that absent an emergency, the police were not allowed to come into the building. He stated that once a person entered the front door, it would take one to two minutes for the person to get to the appellant's second-floor condominium.

On cross-examination, Reasor testified that once an owner's guest gained entry to the building, the guest had free access to the building's hallways. He acknowledged that he had seen deliverymen in the hallways and that there was a reduced expectation of privacy in the hallways. He also acknowledged that if he had thought someone was selling drugs from a

condominium, he would have contacted the police and would have expected them to come into the building to investigate. He stated that he was unaware of any problems in the appellant's condominium until the police "raided" it. He acknowledged that if the police came to the building in response to an emergency or in order to investigate, the police could call dispatch to obtain the access code. He said it was his understanding the code had "just been registered with the police department, just like it has with the postal service, and it's [to be used] at their discretion." He acknowledged that there were no "no trespassing" signs posted around the building and that an owner or a guest had the authority to let the detectives into the building. On redirect examination, Reasor testified that the building's homeowners association may have provided the police department with the access code "as a matter of courtesy." On recross-examination, Reasor testified that he would not let police officers into the building without a warrant.

Metropolitan Nashville Police Detective Joseph Simonik testified that on August 16, 2005, he went to the appellant's condominium building in response to an anonymous complaint that had been called in to "244-dope-line." According to the caller, the appellant was selling pills from his residence and place of business. Detective Simonik decided to do a "knock and talk" at the appellant's condominium and went to the building with Detectives Fox, Osborne, Stokes, and Gonzales. When they arrived, they encountered the building's locked front door. Detective Simonik

called dispatch to obtain the door's access code. While waiting for the code, a man came out of the building, said hello to the officers, and opened the door for them. Detective Simonik said the man was in his late twenties or thirties, was dressed casually, and was possibly a resident. The officers went inside and went up to the appellant's condominium. Detectives Simonik, Fox, and Osborne went to the appellant's unit while Detectives Stokes and Gonzales waited down the hall.

Detective Simonik testified that although the detectives were not wearing police uniforms, they were wearing "raid jackets" marked with a police patch and a badge and were clearly identified as police officers. Detective Simonik knocked on the door, and Kimberly Knight opened it. The detective told her they were looking for the appellant, and Knight told them he was not there. Detective Simonik asked Knight if they could come inside and speak with her, and she said yes. Knight told Detective Simonik she had been living in the condominium for about three weeks; Detective Simonik later discovered she had clothes in the condominium and a key to the residence. In the living room, the officers saw a glass smoking pipe and a knife with a white residue on it. Knight asked if she could telephone the appellant, and she called him with her cellular telephone. Detective Simonik spoke with the appellant on the phone and explained to him why the detectives were there. Detective Simonik asked the appellant if he could come to the condominium, and the appellant

said yes. When the appellant arrived, Detective Simonik asked to search the home. The appellant seemed nervous and refused to consent to the search. Detective Simonik had the scene "frozen" and left to get a search warrant. He obtained the warrant, returned to the condominium, and executed the warrant. During the search, officers found drugs, drug paraphernalia, pornographic images of children, and three pornographic compact discs.

Detective Simonik testified that Knight told him the appellant had drugs and a gun at his place of business. Officers obtained another search warrant and searched the business. There, they found more drugs, a gun, and a large number of pornographic images of children. The appellant was arrested and told Detective Simonik he had been using cocaine since September. He also told the detective that he exchanged the drugs with his friends for money but that he did not consider this to be "selling" drugs.

On cross-examination, Detective Simonik acknowledged that without a warrant, police had to have consent to enter a home. He stated that although he had described the tipster as "anonymous" on direct examination, he spoke with the caller and got the caller's name. However, he did not "check out" the caller. He acknowledged that he waited five days after the tip to go to the appellant's condominium and that going to the condominium was not an emergency. He stated that after searching the appellant's home and business, he learned the appellant had a pharmacy license. He acknowledged that he did not use

the speaker at the building's front door to call the appellant's condominium because he did not want to "tip off" anyone in the condominium that the police were there.

In a written order, the trial court noted that in order for a person, other than a resident, to gain entry to the condominium building, the person had to have express authorization to enter. The court determined that the area between the door of the building and the appellant's condominium door was "within the curtilage of his home, and is protected from warrantless entry by the Fourth Amendment." Therefore, the court concluded that the detectives should have obtained consent to enter the building because exigent circumstances did not exist to justify a warrantless entry. The trial court ruled that because the unidentified male who held open the door for the detectives could have been a resident, a guest, or a trespasser, the detectives did not obtain lawful consent to enter the building. Nevertheless, the trial court denied the appellant's motions because it determined that the detectives gained lawful entry to the appellant's condominium when Kimberly Knight, who lived in the condominium with the appellant, gave consent for the detectives to come inside. Through an interlocutory appeal to this court, the appellant challenges the denial of the motions.

II. Analysis

The appellant contends that the trial court correctly concluded the detectives' entry of the private condominium building was unlawful because it violated the appellant's reasonable expectation of privacy and, therefore, violated his constitutional right to be free from unreasonable searches and seizures. However, he argues that the trial court incorrectly concluded Knight's consent for the detectives to enter the condominium cured the taint because "like a set of dominoes, the searches of the [condominium], business and the custodial interrogation all fall pursuant to the 'fruit of the poisonous tree' doctrine [when] the initial intrusion into Mr. Talley's condominium was unlawful." The State contends that the detectives' entry to the building was lawful because the homeowner's association consented to the entry by providing the police department with the access code in order for police to investigate complaints. The State also contends that the detectives' entry was lawful because a man "with apparent authority" permitted it. In response, the appellant argues that according to Charles Reasor's testimony, the police were to use the access code only for an emergency, not merely an investigation. He also argues that the only time the police could lawfully use the access code for investigative purposes was if one of the condominium owners summoned them. Finally, he contends that the unidentified man could not consent to the entry because the State failed to show the man had any right to use or occupy the building.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn.1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Id.* Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn.2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *Odom*, 928 S.W.2d at 23.

A. Reasonable Expectation of Privacy in the Condominium Building

The Fourth Amendment to the United States Constitution provides that every person has the right to be free from unreasonable searches and seizures. Article I, section 7 of the Tennessee Constitution similarly provides "[t]hat the people shall be secure ... from unreasonable searches and seizures." The Tennessee Supreme Court has previously noted that, generally, "'article I, section 7 is identical in intent and purpose with the Fourth Amendment.'" *State v. Downey*, 945 S.W.2d 102, 106 (Tenn.1997) (citation omitted). However, the court also noted that, in some

cases, the Tennessee Constitution may afford greater protection. *Id.* When determining whether an unreasonable government intrusion has occurred, the first question is whether the defendant had a reasonable expectation of privacy. *See Katz v. United States,* 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J. concurring). In order to answer this question, we must determine "(1) whether the individual had an actual, subjective expectation of privacy and (2) whether society is willing to view the individual's subjective expectation of privacy as reasonable and justifiable under the circumstances." *State v. Munn,* 56 S.W.3d 486, 494 (Tenn.2001) (citing *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979)).

In support of his argument that a person has a reasonable expectation of privacy in the common areas of a locked apartment building, the appellant relies heavily on *United States v. Carriger,* 541 F.2d 545 (6th Cir.1976). In *Carriger,* the Sixth Circuit Court of Appeals considered "whether a tenant in an apartment building has a reasonable expectation of privacy in the common areas of the building not open to the general public." 541 F.2d at 549. The court concluded that "when, as here, an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed." *Id.* at 552. As the court explained, "A tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect

trespassers." *Id.* at 551. Citing *Carriger,* some state courts also have held that a reasonable expectation of privacy exists in the hallways of a multiple-unit apartment building. *People v. Trull,* 64 Ill.App.3d 385, 20 Ill.Dec. 960, 380 N.E.2d 1169, 1173 (Ill.App.Ct. 4th Dist.1978); *People v. Killebrew,* 76 Mich.App. 215, 256 N.W.2d 581, 583 (Mich.Ct.App.1977); *see also State v. Di Bartolo,* 276 So.2d 291, 294 (La.1973).

Just a year later, however, the Eighth Circuit specifically disagreed with *Carriger* in *United States v. Eisler,* 567 F.2d 814, 816 (8th Cir.1977), stating that the "locks on the doors to the entrances of the apartment complex were to provide security to the occupants, not privacy in common hallways." The appellate court held that "[a]n expectation of privacy necessarily implies an expectation that one will be free of any intrusion, not merely unwarranted intrusions." *Id.* Because the hallways of the defendants' locked apartment building were available for use by the residents, their guests, the landlord and the landlord's agents, and any other person "having legitimate reasons to be on the premises," the court concluded that the defendants did not have a reasonable expectation of privacy in the building's hallways. *Id.* Various other federal and state jurisdictions also have found that privacy interests do not exist in the locked common areas of multi-unit apartment buildings. *See United States v. Nohara,* 3 F.3d 1239, 1241-42 (9th Cir.1993); *United States v. Concepcion,* 942 F.2d 1170, 1171-72 (7th Cir.1991); *United States v. Holland,* 755 F.2d 253 (2d Cir.1985); *State v. Davis,* 711 N.W.2d

841, 845 (Minn.Ct.App.2006); *Commonwealth v. Reed*, 851 A.2d 958, 962 (Pa.Super.Ct.2004); *Commonwealth v. Dora*, 57 Mass.App.Ct. 141, 781 N.E.2d 62, 67 (Mass.App.Ct.2003); *People v. Lyles*, 332 Ill.App.3d 1, 265 Ill.Dec. 591, 772 N.E.2d 962, 966 (Ill.App.Ct. 1st Dist.2002).

In our view, access by third parties alone does not necessarily negate a reasonable expectation of privacy in a locked apartment building's common areas. *See Cornelius v. State*, 2004 Minn.App. LEXIS 149 (Minn.Ct.App. Feb. 10, 2004); *State v. Trecroci*, 246 Wis.2d 261, 630 N.W.2d 555, 566 (Wis.Ct.App.2001); *see also Killebrew*, 256 N.W.2d at 583 (stating that, generally, tenants in an apartment building have a reasonable expectation of privacy in hallways that are shared by occupants and guests). On the other hand, we also disagree with the Sixth Circuit's bright line rule that a tenant has a reasonable expectation of privacy in the common areas of a locked apartment building. The Sixth Circuit's reasoning in *Carriger*, that a tenant expects other tenants and invited guests to enter a building's common areas but does not expect trespassers, is flawed because a person's being a trespasser is irrelevant if tenants do not have a reasonable expectation of privacy in those areas. *See Eisler*, 567 F.2d at 816.

The determination as to whether a tenant has a reasonable expectation in the common areas of a locked apartment building is a fact-driven issue. In the instant case, Charles Reasor testified that owners could give their guests the access code to get into the

building and that various nonresidents such as delivery and cleaning people used the code. *See State v. Breuer*, 577 N.W.2d 41, 46-47 (Iowa 1998) (noting as one factor in its conclusion that the defendant had a reasonable expectation of privacy in the stairway of his locked apartment building was that guests usually waited at building door after ringing doorbell). Furthermore, twenty-one condominiums were in the building. *Compare id.* (noting that only two units were in the building). Given the numerous third parties that had unescorted access to the building's common areas, we conclude that the appellant in this case did not have an actual, subjective expectation of privacy in those areas.

Regarding the State's claim that the detectives obtained consent to enter the building from the person who held the door open for them, there is no proof that the person had authority to give consent. As to the State's claim that the detectives lawfully entered the building because the homeowner's association had provided the code to the police department, we find this argument unpersuasive because the detectives did not use the code to enter the building. Nevertheless, because the appellant did not have a reasonable expectation in the building's common areas, we conclude that the trial court erred by ruling the detectives entered the building unlawfully.

B. Fruit of the Poisonous Tree

Given the possibility of further appellate review, we will now determine whether the trial court properly concluded that Kimberly Knight's consent for the detectives to enter the condominium cured the taint of their illegal entry into the building. Again, we disagree with the trial court's conclusion.

In *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963), the United States Supreme Court observed that the exclusionary rule bars the admissibility of evidence obtained both directly and derivatively from an unlawful invasion of an individual's privacy or personal security. However, the court declined to hold that "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." 371 U.S. at 487-88, 83 S.Ct. at 417. Instead, the court held that, in determining whether physical or verbal evidence is the fruit of a prior illegality, the "apt question . . . is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" 371 U.S. at 488, 83 S.Ct. at 417. Therefore, consent to search that is preceded by a Fourth Amendment violation may nevertheless validate the search if the consent is voluntary. *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn.1998); *see Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854 (1973). Moreover, the consent must be

"sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun*, 371 U.S. at 486, 83 S.Ct. at 416-17. "The first prong focuses on coercion, the second on causal connection with the constitutional violation." *United States v. Chavez-Villarreal*, 3 F.3d 124, 127 (5th Cir.1993). The trial court found, and the appellant does not dispute, that Knight's consent was voluntary. Therefore, we turn to the causal connection and whether Knight's consent was an exploitation of the prior unlawful entry. *See State v. Garcia*, 123 S.W.3d 335, 346 (Tenn.2003).

To determine whether the causal connection between a Fourth Amendment violation and a consent to search has been broken, a court should consider the following three factors set forth by the United States Supreme Court in *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2261-62, 45 L.Ed.2d 416 (1975): (1) the temporal proximity of the illegal seizure and the consent, (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Although the trial court did not address the issue of attenuation, the question of attenuation is one that this court reviews de novo. *State v. Ford*, 30 S.W.3d 378, 380 (Tenn.Crim.App.2000). The State carries the burden of establishing sufficient attenuation. *Brown*, 422 U.S. at 604, 95 S.Ct. at 2262.

The evidence at the suppression hearing established that after the detectives entered the building, they immediately went upstairs to the appellant's condominium and knocked on the door. According to Charles Reasor's testimony, this would have taken

only one to two minutes. Therefore, factor one, the temporal proximity of the illegal seizure and the consent, weighs against attenuation. As to factor two, the presence of intervening circumstances, the detectives knocked on the door and Knight opened it. The detectives asked to speak with the appellant, and Knight told them the appellant was not there. The detectives then asked to enter the condominium but did not verbally inform Knight that they were detectives investigating a crime. We conclude factor two also weighs against a finding of attenuation. Next, we consider the third factor, the purpose and flagrancy of the official misconduct. Detective Simonik gave contradictory testimony about the identity of the informant, testifying on direct examination that the informant was anonymous but testifying on cross-examination that he got the informant's name. Moreover, aithough the detectives had not received any information that Knight was involved in the appellant's alleged criminal activities, they asked to enter the condominium even though the appellant was not there. Finally, when asked at the suppression hearing why the detectives did not end the investigation when the detectives learned the appellant was not present, Detective Simonik said, "I wanted to come inside and talk, to see if there was anything in plain view, where I could obtain a search warrant. There happened to be stuff in plain view in order for me to obtain that search warrant." The third factor also weighs against a finding of attenuation. Therefore, had we determined that the officers entered the building unlawfully, the State's failure to show the consent

was sufficiently attenuated from the entry into the building would have required suppressing the evidence.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the trial court's denial of the motions to suppress.

IN THE COURT OF CRIMINAL
APPEALS OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE

v.

WILLIAM GLENN TALLEY

Criminal Court for Davidson County

No. 2006-A-559

No. M2007-01905-CCA-R9-CD

ORDER

(Filed Sep. 19, 2007)

This matter is before the Court upon Appellant's application for an interlocutory appeal pursuant to Rule 9, Rules of Appellate Procedure. The Appellant seeks review of the trial court's order denying his motion to suppress evidence. The Appellant contends that a suppression of the contested evidence in this case would, in effect, result in a dismissal of the charges. The Appellant also claims that the specific issue presented is a matter of first impression in this state. In granting the Motion for appeal below, the trial court agreed with these arguments.

Rule 9 outlines the procedure for obtaining interlocutory appellate review of a trial court order. After an appellant gains permission from the trial court to pursue the appeal, an appellant must file a separate

application in this Court. The application must be filed within ten days of the trial court order granting permission to appeal, and the application must be accompanied by copies of the trial court order from which an appeal is sought, the trial court's statement of reasons for granting permission to appeal, and the other parts of the record necessary for determination of the application. Rule 9(d). The Appellant has complied with these procedural requirements. Accordingly, we will consider the merits of the application.

An interlocutory appeal may be granted if the trial and appellate courts both determine that the appeal is necessary to prevent irreparable injury, to prevent needless, expensive, and protracted litigation, and to develop a uniform body of law. Rule 9; *State v. Gilley*, 173 S.W.3d 1, 5 (Tenn. 2005). As the supreme court recognized in *Gilley*, interlocutory appeals are an exception to the general rule requiring a final judgment, thus, these types of appeals are typically disfavored, especially in criminal cases. 173 S.W.3 [sic] at 5. However, assuming the courts determine an interlocutory appeal is appropriate, the application for permission to appeal will be granted. *See State v. Williams*, 193 S.W.3d 502 (Tenn. 2006) (interlocutory appeal granted on suppression issue when trial court determined appeal was necessary to "avoid the time expense of a trial" and to establish a uniform body of law).

This Court has considered all of the criteria expressed in Rule 9, and, having reviewed the Appellant's application and the State's response in

opposition, we determine that the application is well-taken and should, therefore, be granted. Following the supreme court's guidance in *Williams*, we believe review of the specific suppression issue presented in this case at this time "will result in a net reduction in the duration and expense of the [proceedings] if the challenged order is reversed. Tenn. R. App. P. 9(a) Accordingly, the Appellant's application for an interlocutory appeal under Rule 9 is hereby granted. All trial court proceedings in this matter are stayed pending further order of this Court. Within thirty (30) days, an appellate record shall be prepared and transmitted to this Court, and this appeal shall, thereafter, proceed in accordance with the Rules of Appellate Procedure.

So ORDERED.

/s/ Thomas T. Woodall
THOMAS T. WOODALL,
JUDGE

/s/ Jerry L. Smith
JERRY L. SMITH, JUDGE

/s/ Robert W. Wedemyer
ROBERT W. WEDEMYER,
JUDGE

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE

DIVISION V

STATE OF TENNESSEE	**CASE NO. 2006-A-559**
VS	
WILLIAM G. TALLEY	

ORDER

This cause came to be heard on May 23, 2007, upon the motion of the defendant, William G. Talley, through counsel, requesting this Court to suppress any evidence seized and any statements made by him to officers of the Metro Police Department on August 16, 2005. The defendant is charged with two counts of Sexual Exploitation of Minor in violation of T.C.A. § 39-17-1003 and one count of Possession of Controlled Substances With Intent to Sell or Deliver – Schedule III in violation of T.C.A. § 39-17-417; two counts of Possession of Controlled Substances With Intent to Sell or Deliver – Schedule IV in violation of T.C.A. § 39-17-417; one count Possession of Controlled Substances With Intent to Sell or Deliver – Schedule V in violation of T.C.A. § 39-17-417.

The Court heard the arguments of respective counsel and listened to all the testimony presented. The defendant contends that the evidence seized and any statements made by the defendant were the fruit of an illegal seizure and in violation of his rights as guaranteed by the Fourth and Fifth Amendments to

the Constitution of the United States and Article One Sections Seven and Nine of the Constitution of Tennessee.

FACTS

The Court finds that during August of 2005, the police received an anonymous telephone call about drug activity at the defendant's residence. On August 16, 2005, Detective Joseph Simonik, Detective Fox, Detective Osborne, Detective Gonzales, and Detective Stokes went to the defendant's residence located at 116 31st Ave. unit #201 to investigate the complaints received. The defendant lived in a private condominium on the second floor and is also part owner in the condominium building. The entrance to the condominium building was guarded by a security system and any person without a key would have to be buzzed in by a tenant. While trying to obtain the code to enter the building from the Metropolitan Police Dispatch, a man leaving the condominium held the door open for the detectives to enter.

Mr. Talley's girlfriend, Kimberly Knight, answered the door to the apartment and consented to the detectives' entrance. Upon entrance, Detective Simonik observed a smoking pipe with copper mesh inside and a knife with white residue on it in the living room as well as another individual, Shane Cathy [sic]. Detectives asked Ms. Knight about the whereabouts of the defendant and Ms. Knight indicated that he was not home. Ms. Knight called the

defendant on the phone and the defendant spoke with the detective. Ms. Knight explained that she had been staying at the apartment approximately three weeks, that Mr. Talley sold pills and cocaine, that he had illegal narcotics and a pistol at his business, and that they were kept under the sink in his office.

Detective Simonik obtained search warrants of the defendant's residence and business based on information given by Ms. Knight. Pursuant to the search of the defendant's residence, detectives recovered drugs, drug paraphernalia, sexual images of children as well as other electronic items were found in Mr. Talley's residence. The defendant was arrested and given his *Miranda* warnings during the execution of the search warrant of his business located at 535 Brick Church Park Drive. The detectives also recovered drugs, drug paraphernalia, and images of child pornography from his business. During booking, Mr. Talley disclosed that he gave the pills to his friends and in return they would give him money, but he did not consider that selling.

Based on the items recovered from the execution of the search warrants of the defendant's residence and business, the detectives obtained additional warrants on March 14, 2006 and September 19, 2006 to search the defendant's desktop computers, notebook computer, and computer discs in the possession of the Metropolitan Nashville Police Department's Property and Evidence. A search of the defendant's computers and computer discs revealed several sexual images of children.

Legal Analysis

The defendant contends that any evidence obtained from the search of his residence should not be admissible in the trial in this cause and that, specifically, a condominium owner has a reasonable expectation of privacy in the common area of the condominium building and officers unlawfully entered the curtilage of his home when they entered the premises through the locked condominium door without a warrant, consent, or exigent circumstances. The defendant moves to suppress the evidence because he asserts it was unlawfully secured in violation of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution. Mr. Talley contends he has a reasonable expectation of privacy that society would deem objectively reasonable in the curtilage of his home, which includes the entrance of his locked condominium premises.

The defendant further challenges the entry into the condominium building on the basis of an anonymous tip. The defendant contends officers waited four days before conducting a "knock and talk" investigation indicating that there were no emergency or other exigent circumstances justifying the entry into the building.

Additionally, the defendant challenges the plain view seizure of evidence within his home. The defendant contends in order to constitute plain view seizure of evidence the officers must not have violated the Fourth Amendment in arriving at the place from

which evidence could be plainly viewed. The defendant further challenges the validity of the search warrant of the residence because it did not establish probable cause to search his condominium.

The defendant also moves to suppress his statements made to the police contemporaneous with his arrest at his business located at 535 Brick Church Park Drive. The defendant asserts that the statements were taken in violation of his Fourth, Fifth, and Sixth Amendment rights guaranteed to him by the Constitution of the United States and Article I, Sections 7 and 9 of the Tennessee Constitution. The defendant contends that the State has not provided the defense with any written Miranda waiver and that any statements given by him were taken in violation of Miranda and his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. The defendant contends that his statements were the result of an unlawful Fourth Amendment violation.

Initial Entry into the Locked Condominium Premises

The threshold issue the Court must decide is whether the initial entry into the locked condominium entrance was a Fourth Amendment violation; specifically whether Defendant Talley had a reasonable expectation of privacy in the area within the locked condominium building but outside of his actual condominium residence. A person has a reasonable

expectation of privacy if one has an actual, subjective expectation of privacy and that expectation of privacy is one that society would deem objectively reasonable. *Katz v. United States*, 389 U.S. 347, 360 (1967).

The Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution protect the citizens of Tennessee against unreasonable searches and seizures of a dwelling and the curtilage which adjoins the dwelling. *State v. Ellis*, 1990 WL 198876, 3 (Tenn.Crim.App.1990). Curtilage is the space of ground adjoining the dwelling house, used in connection therewith in the conduct of family affairs and for carrying on domestic purposes, thus the dwelling house embraces the curtilage. *State v. Welch*, 289 S.W. 510, 511 (Tenn.1926) (citing 17 Corpus Juris 437). The Courts have extended Fourth Amendment protection of the home to the curtilage. *State v. Prier*, 725 S.W.2d 667 (Tenn.1987); see also *Boyd v. United States*, 116 U.S. 616 (1886).

The Court in Tennessee held that the curtilage is entitled to the same constitutional protection against ground entry and seizure as is the home. *State v. Prier*, 725 S.W.2d 667 (Tenn.1987). Although the Fourth Amendment and Article I, Section 7 of the Tennessee Constitution protects places where persons exhibit a subjective expectation of privacy that society would deem objectively reasonable; this protection is not absolute. A person does not have an expectation of privacy in personal property or premises he exposes to the public. *State v. Ellis*, 1990 WL 198876 (Tenn.Crim.App.1990). "A sidewalk, pathway or similar

passageway leading from a public sidewalk or roadway to the front door of a dwelling constitutes an implied invitation to the general public to use the walkway for the purpose of pursuing legitimate social or business interest with the individuals residing inside the dwelling. *Id.* at 3. This invitation inside the curtilage of a dwelling extends to police officers who are conducting an investigation. *Id.* For most homes the boundaries of the curtilage will be clearly marked, and the conception defining the curtilage as the area around the home to which the activity of home-life extends is a familiar one easily understood from our daily experience. *State v. Prier*, 725 S.W.2d 667, 670-671 (Tenn.1987).

Under the Tennessee Constitution, a warrant is required to conduct a search or seizure on private property, including the curtilage, absent an applicable exception to the warrant requirement. *State v. Smith*, 1992 WL 46840, 5 (Tenn.Crim.App.1992). If a seizure takes place within the curtilage of a home, the issue to be considered is whether it was necessary to obtain a search warrant before entering the premises or whether exigent circumstances existed which would have alleviated the officers from obtaining a warrant. *Id.* at 4-5. Probable cause and exigent circumstances must exist for an officer to lawfully enter into a private residence without a warrant. *State v. Carter*, 160 S.W.3d 526, (Tenn. 2005); 2003 WL 22213225, 4 (Tenn.Crim.App 2004); see also *Kirk v. Louisiana*, 536 U.S. 635, 638 (U.S.2002). Exigent circumstances may occur when officers are in 'hot pursuit' of a fleeing

suspect, when the suspect presents an immediate threat to the arresting officers or the public, or when immediate police action is necessary to prevent the destruction of vital evidence or thwart the escape of known criminals. *State v. Carter*, 160 S.W.3d 526, (Tenn. 2005); 2003 WL 22213225, 4 (Tenn.Crim.App.2004) (citing *Jones v. Lewis*, 874 F.2d 1125, 1130 (6th Cir.1989). The State has the burden of demonstrating exigent circumstances to overcome the warrant requirement. *State v. Carter*, 2003 WL 22213225, 4 (Tenn.Crim.App.2004); see also *Welsh v. Wisconsin*, 466 U.S. 740, 750 (U.S.1984). When exigent circumstances are absent to justify the warrantless search of the premises, only the evidence obtained as a result of the warrantless entry into the premises by the officers may be lawfully suppressed. *State v. Prier*, 725, S.W.2d 667, 668 (Tenn.1987).

The area between the entrance of the condominium building and the defendant's condominium door is within the curtilage of his home, and is protected from warrantless entry by the Fourth Amendment. This area was used in the daily operation of the premises. It is the entrance used by all the residents and delivery personnel. In order for any person other than a resident to gain entry, they must be buzzed in or in possession of an entry code and thus authorized to enter the building. The threshold of the defendant's door extends to the entrance of the condominium building. The pathway that leads from the sidewalk to the front of the condominium building is for use by the public when conducting legitimate business. The

detectives lawfully used the pathway leading to the condominium building's entrance. When the officers arrived outside the building's front entrance, they should have attempted to gain consent to enter the condominium premises in order to conduct the "knock and talk". A "knock and talk" is a consensual encounter and the detectives could have been authorized or refused entry at the front door of the condominium. *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir.2000); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

The defendant has a subjective expectation of privacy in the area between the entrance to the condominium building and the door to his condominium unit. Unlike an apartment tenant, a condominium owner has a property interest in the building. There is a security buzzer at the entrance to the building and persons other than residents need express authorization to enter. Express authorization is given by being buzzed in or by being given the access code. The security buzzer system allows residents to determine the amount of accessibility the general public has to individual condominium units. This expectation of privacy is reasonable for the security and privacy of condominium owners.

The detectives did not have probable cause or exigent circumstances to enter the premises without a warrant. The detectives were on the premises to conduct a "knock and talk". The officers had something less than probable cause and reasonable suspicion to engage in this consensual encounter.

There were not exigent circumstances at the time of the entry and officers did not claim exigent circumstances existed to justify the warrantless entry. The state argued the detectives' entrance was lawfully obtained by consent given by a person leaving the building as they were entering. It is unknown who held the door open for the officers to enter; the person may have been a resident, guest, or trespasser. This uncertainty is not the equivalent of express authorization. The detectives' entry was an unreasonable departure from an area where the public is impliedly invited and an intrusion upon a constitutionally protected expectation of privacy. *State v. Ellis*, 1990 WL 198876, 4 (Tenn.Crim.App.1990); see also *State v. Seagull*, 95 Wash.2d 898 (1981).

However, no incriminating evidence was discovered or seized as a result of the unlawful entry. Actually, nothing was seized from this area. If evidence was discovered or seized from this curtilage area it would not be admissible. Nevertheless, the unlawful entry is not determinative of the propriety of the subsequent seizure of evidence.

Knock and Talk

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and "Article 1, Section 7 [of the Tennessee Constitution] is identical in intent and purpose with the Fourth Amendment." *State v. Downey*, 945 S.W.2d 102, 106 (Tenn.1997) (citing *Sneed v. State*,

221 Tenn. 6, 423 S.W.2d 857, 860 (1968)). In order to comply with the Fourth Amendment, the state must seek the issuance of a search warrant based upon probable cause from a detached magistrate before a house is searched. *State v. Jacumin*, 778 S.W.2d 430, 432 (Tenn. 1989) (citing *Johnson v. United States*, 33 U.S. 10, 13-14 (1948)). However, officers do not need a search warrant when conducting a knock and talk.

Tennessee courts have held that "knock and talk" is an investigative technique. *State v. Cothran*, 115 S.W.3d 513, 521 (Tenn.Crim.App.2003); see also *United States v. Jones*, 239 F.3d 716, 720 (5th Cir.). That it is a consensual encounter, as well as a means to request consent to search the residence. *State v. Cothran*, 115 S.W.3d 513, 521 (Tenn.Crim.App.2003) (citing *Latta v. State*, 350 Ark. 488, 497 (Ark.2002)). *United States v. Cormier* held that no suspicion needed to be shown in order to justify a "knock and talk"; neither probable cause nor reasonable suspicion is needed for the consensual investigative procedure. *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir.2000); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991). It is therefore not improper for an officer to go to a particular house and seek admission for the purpose of investigating a complaint. 1 LaFave, Search and Seizure § 2.3(b) (3d ed.1996). In addition, the Court in *Cothran* held while conducting a "knock and talk" there is no requirement that the officers announce their identity; this is because of the consensual nature of the encounter. *State v. Cothran*, 115 S.W.3d 513, 523 (Tenn.Crim.App.2003)

The present "knock and talk" was based on confidential phone calls to the drug hotline received by the detective. The "knock and talk" was an investigative technique to follow-up on the tips. The confidential tip was the basis of the "knock and talk". The phone call was made to a call center specially designed to handle information about criminal activity provided by citizens.

In Tennessee law there is a distinction between "citizen informants" and "criminal informants." *State v. Cauley*, 863 S.W.2d 411, 417 (Tenn.1993) (citing *State v. Melson*, 638 S.W.2d 342, 354 (Tenn.1983)). Information supplied by a citizen informant is presumed reliable. *State v. Luke*, 995 S.W.2d 630, 636 (Tenn.Crim.App.1999). Reliability is presumed because citizen informants have necessarily gained their information through first-hand experience and is acting in the interests of society or personal safety. *Id;* see also *Melson*, 638 S.W.2d at 354-356 (Tenn. 1983); *State v. Smith*, 867 S.W.2d 343, 347 (Tenn.Crim.App.1993). When the citizen informant has obtained the information secondhand, the informant will be presumed reliable if the officer has no reason to doubt the credibility of the first-hand witness or the reliability of the information. *State v. Luke*, 995 S.W.2d 630, 637 (Tenn.Crim.App.199) [sic] (citing *State v. Russell*, 1997 WL 84661 (Tenn.Crim.App.1997).

In this case, the informant is known to the detective but his name was not disclosed. The informant told the detective that the defendant sold pills to his

girlfriend. It is unknown whether the informant saw the exchange of money for pills or whether he was informed of the fact. Whether the informant had first or second-hand knowledge, he would be presumed reliable if the officers had no reason to doubt the credibility of the first-hand witness or the reliability of the information. Therefore, he would qualify as a citizen informant for the presumption of reliability. There is no particular standard to justify a knock and talk, but it is something less than probable cause or reasonable suspicion. *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir.2000); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991).In the instant case, the tip provided by the citizen informant provided sufficient support to justify a knock and talk.

Entry into the Condominium Unit

The initial entry into the condominium building was unlawful but the entrance into the actual condominium unit was in fact lawful. In *McGee v. State*, Tennessee Courts applied the "common authority" test. *State v. Bartram*, 925 S.W.2d 227, 231 (Tenn. 1996) (citing *McGee v. State*, 2 Tenn.Crim.App. 100, 105, 451 S.W.2d 709, 712 (Tenn.Crim.App.1969)). In *McGee*, the Court held that persons having equal rights to use or occupy the premises may consent to a search of the premises and the search will be binding upon co-occupants. *Id.*

Ms. Knight, can be deemed a co-occupant with equal right to use of the premises. Ms. Knight was

the defendant's girlfriend who answered the apartment door when the detective arrived to conduct a "knock and talk". Ms. Knight consented to the detectives' entrance into the condominium unit voluntarily. Detective Simonik said Ms. Knight had a key to the condominium, clothes at the residence, she had been at the residence for three weeks, and she had her brother as a guest in the home at the time of the "knock and talk". Even if Ms. Knight did not have the authority to consent to the officers' entry, the Court in *Illinois v. Rodriguez* held that a warrantless entry based on the consent of a third party is valid if at the time of the entry the police officers reasonably believed she had the authority to allow entrance. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). It was reasonable to believe that she had authority to allow the police to enter because at the door she told them that Mr. Talley was not home and that she was his girlfriend.

Independent Source Doctrine

Under the independent source doctrine analysis, applied in *State v. Carter*, evidence previously excluded may be deemed admissible when sustained by an independent source. The exclusionary rule may bar the admissibility of evidence which was obtained from an unconstitutional search or seizure. *State v. Carter*, 2003 WL 22213225, 5(Tenn.Crim.App.2004); see also *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). The exclusionary rule does not apply when the

evidence was obtained by means independent of the constitutional violation. *Id.*

In this case, the exclusionary rule would only apply to evidence seized as a result of the initial warrantless entry into the condominium building. The exclusionary rule would not apply to evidence subsequently seized pursuant to facts entirely independent and separate from the facts or evidence discovered as a result of the initial illegal entry. In the instant case, a smoking pipe with copper mesh inside and a knife with white residue on it was observed in plain view upon the detectives' consensual entry into the defendant's specific condominium unit.

Plain View

The plain view doctrine provides that the police may seize evidence in plain view without a warrant. *State v. Davis*, 2005 WL 2255968, 8 (Tenn.Crim.App.2005); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (U.S.N.H.1971). Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *United States v. Freeman*, 426 F.2d 1351, 1353 (9th Cir.1970); see also *Ker v. California*, 374 U.S. 23, 42-43 (1963); *United States v. Lee*, 274 U.S. 559 (1927); *Hester v. United States*, 265 U.S. 57 (1924). Prerequisites to the application of the plain view doctrine include: 1) the officer did not violate constitutional mandates in arriving at the location from which the

evidence could plainly be seen; 2) the officer had a lawful right of access to the evidence; and 3) the incriminating character of the evidence was "immediately apparent."

Here, the evidence should not be suppressed because the prerequisites to apply the plain view doctrine have been met. The officers arrived at the residence to conduct a "knock and talk." The initial entry into the condominium building was unlawful but the entry into the condominium unit itself was authorized by Kimberly Knight. The detectives were given consent to enter the location from which the evidence could be plainly seen. The officers had a lawful right of access to the evidence. Upon entry into the condominium, the officers did not search the premises but simply observed the contraband from inside the doorway. The incriminating character of the evidence was "immediately apparent." The detective's training and experience enabled him to immediately determine the illegal nature of the smoking pipe with copper mesh inside and a knife with white residue on it. The evidence seen in plain view was not the result of the unlawful initial entry but a result of the consensual entrance authorized by Ms. Knight. The evidence seized due to the plain view doctrine is admissible pursuant to the independent source doctrine.

Warrant

The independent source doctrine provides, "an unconstitutional entry does not compel exclusion of evidence found within a home if that evidence is subsequently discovered after execution of a valid warrant obtained on the basis of facts known entirely independent and separate from those discovered as a result of the illegal entry." *State v. Carter*, 160 S.W.3d 526, (Tenn. 2005); 2003 WL 22213225, (Tenn.Crim.App.2004) (citing *Segura v. United States*, 468 U.S. 796, 813-814 (1984); see also *State v. Clark*, 844 S.W.2d 597, 600 (Tenn. 1992). In order for evidence obtained during the execution of the search warrant to be found independent of the prior unconstitutional entry, information discovered during the unlawful entry must not have been presented to the issuing magistrate. *State v. Carter*, 160 S.W.3d 526, (Tenn. 2005); 2003 WL 22213225, (Tenn.Crim.App.2004); see also *Clark*, 844 S.W.2d at 600.

In this case, the search warrant was obtained on the basis of information entirely independent from any information discovered during the initial warrantless entry. The officers did not observe any incriminating evidence during the initial warrantless entry. The information in the affidavit was obtained pursuant to the plain view doctrine and statements made by Ms. Knight. Thus, the evidence seized during the execution of the search warrant was admissible pursuant to the independent source doctrine.

This was initially a warrantless investigative knock and talk but Detective Simonik obtained search warrants based on information provided by Ms. Knight, defendant Talley's girlfriend. In the instant case, the search warrant in pertinent part states:

> "You are therefore commanded to make and [sic] immediate search of the premises known as 116 31st Avenue North Apartment 201, Nashville, Davidson County, Tennessee, upon the persons of anyone using or occupying the subject location, which is more particularly described as follows; a multi-level, condo facility named Hedrick Place Condos. The Number 116 is in gold affixed to the right of the entrance way. Once inside the condo-building the condo to be searched is number 201. The door to the condo is white in color and the number 201 is in gold on the condo door; including all outbuildings, outhouses, garages, storage buildings, and vehicles found thereon or in close proximity, which have a nexus to the location or persons present at the location, for the aforesaid evidence; and if you find the same or any part thereof, you shall seize the evidence, make a report to this Court of the seized evidence, and preserve the recovered evidence in Nashville, Tennessee, pending further orders of the Criminal Court, Davidson Country [sic], Tennessee."

In pertinent part, the search warrant affidavit for Mr. Talley's residence states:

"Detectives received a drug complaint on 116 31st Avenue North Apartment 201. Detectives went to this location and knocked on the door and a Kimberly Knight (F/W dob 10-29-86) answered the door. Detective Fox explained to Kimberly Knight that we were there for a drug complaint. Your Affiant asked Kimberly Knight if we could come inside to talk with her and she gave detectives permission to come inside the residence. Once your affiant came into the living room of this location on the table in plain view your affiant saw a glass smoking pipe with copper mesh in it with residue. Next to this pipe there was a knife with white residue on it. Your affiant asked Kimberly Knight if she lived at the residence and Kimberly Knight states she had been staying there for about 3 weeks. Detective Fox asked Shane Cathey who was also at this residence if he had anything illegal on is [sic] person and Mr. Cathey replied not that I know of and then Detective Fox asked are you sure and Mr. Cathey replied well I have some pills and motioned to his right front pants pocket. Detective Fox recovered 43 Xanax Bars and 3 half bars of Xanax from Mr. Cathey's pocket which were packaged in 2 clear bags."

"Your affiant then called Mr. William Glenn Talley (M/W DOB 12-19-62) using Kimberly Knights phone. Your affiant asked Mr. Talley if 116 31st Ave North Apartment 201 was his residence and he replied yes and that he would be home in a few minutes. When Mr. Talley arrived at this location your

affiant explained to Mr. Talley what was going on asked him if he would be willing to sign a consent to search form. Your Affiant read this form to Mr. Talley and Mr. Talley stated that he would like to call an attorney and asked their opinion on what he should do. After calling several different attorneys Mr. Talley was unable to get a hold of any of them. Your affiant then asked him if he would like to sign the consent form and Mr. Talley replied that he did not think that would be a good idea."

In the instant case, the search warrant for Mr. Talley's business in pertinent part states:

"You are therefore commanded to make an immediate search of the premises known as 535 Brick Church Park Drive, Nashville, Davidson County, Tennessee, upon the persons of anyone using or occupying the subject location, which is more particularly described as follows: a business named THM Inc., that is constructed of grey block with white and grey siding. The number 535 is white in color and is affixed above the front door. The name of the business Tennessee Home Medical is also affixed to the front door; including all outbuildings, outhouses, garages, storage buildings, and vehicles found thereon or in close proximity, which have a nexus to the location or persons present at the location, for the aforesaid evidence; and if you find the same or any part thereof, you shall seize the evidence, make a report to this Court of the seized

> evidence, and preserve the recovered evidence in Nashville, Tennessee, pending further orders of the Criminal Court, Davidson Country [sic], Tennessee."

In pertinent part, the search warrant affidavit states:

> "During the conversation with Detective Simonik Mr. Talley stated that he owned a business named TIIM (Tennessee Home Medical). One 8/16/05 officers executed a narcotics warrant at 116 31st Avenue North Apartment 201, which is the residence of William Talley. Detectives recovered at this residence thousands of pills that are schedule narcotics, marijuana, and drug paraphernalia as well as several images of child pornography that were downloaded from different internet sites. While under Miranda, Kimberly Knight, Mr. Talley's girlfriend, states that Mr. Talley commonly stores illegal narcotics at his place of business which is Tennessee Home Medical (THM inc.). Ms. Knight also states that she has seem [sic] illegal narcotics at the location at 535 Brick Church Park Drive. Ms. Knight stated that she had seen illegal narcotics stored in a hidden compartment located under a sink located in Mr. Talley's office."

Therefore, the Court finds the officers had a valid basis to lawfully conduct a "knock and talk" based on the information provided by the citizen informant. Further, the Court finds that although the initial entry into the condominium building was unlawful, the

officers gained entry into Mr. Talley's condominium unit lawfully. The search warrants were issued based on affidavits, which contained evidence of a crime found in plain view and statements made by Kimberly Knight. Therefore, the motion to suppress physical evidence is respectfully DENIED. Additionally, there was uncontroverted testimony that Miranda warnings were given upon arrest and the defendant Talley waived his right to speak without an attorney and made statements. Therefore, the Court finds that the motion to suppress the statements made by defendant Talley is respectfully DENIED.

IT IS SO ORDERED.

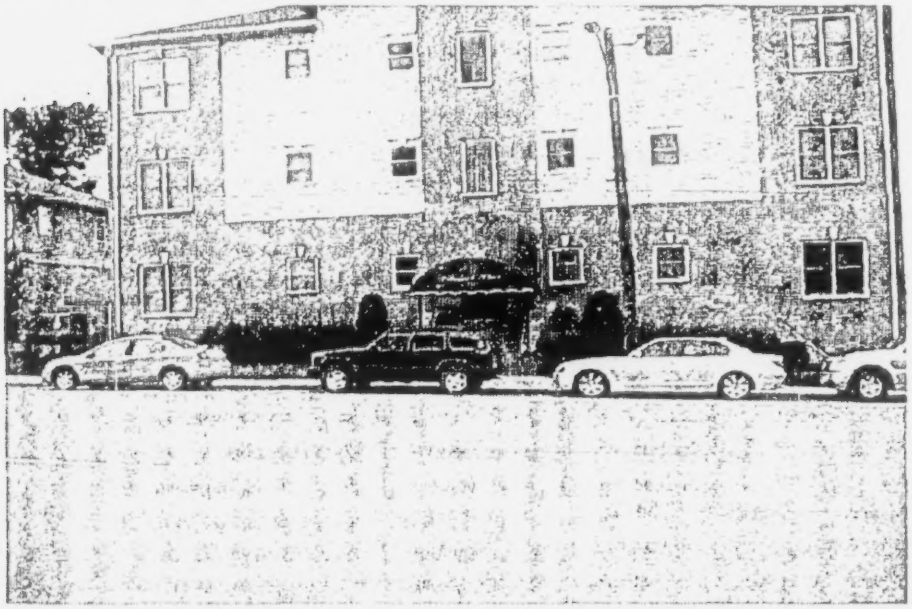
Entered this the 20th day of June, 2007.

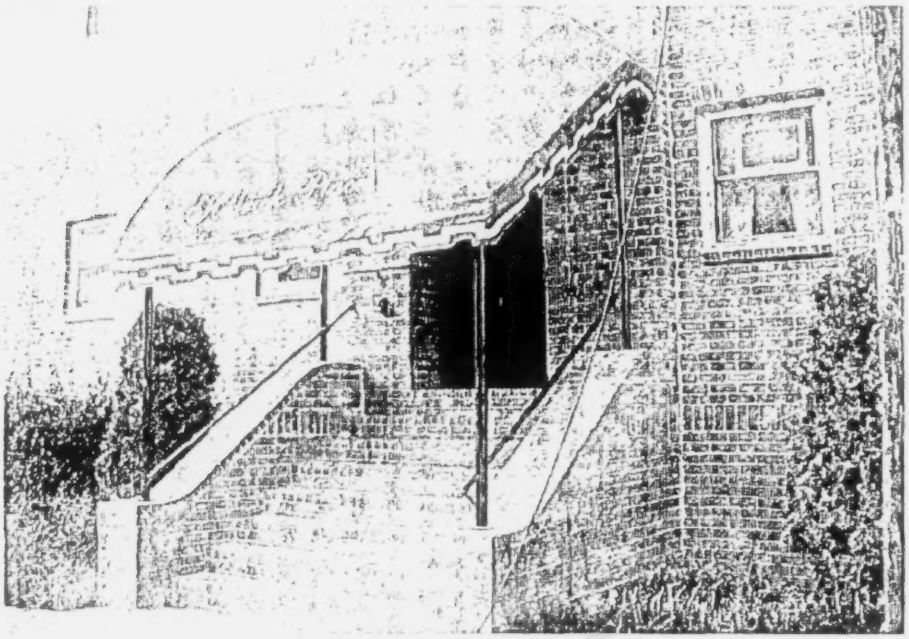
/s/ Monte D. Watkins
MONTE D. WATKINS, JUDGE
DIVISION V

CC: Ed Yarbrough
David Raybin
Deborah Housel

Selected Trial Exhibits

The following four photographs are part of Collective Exhibit 3





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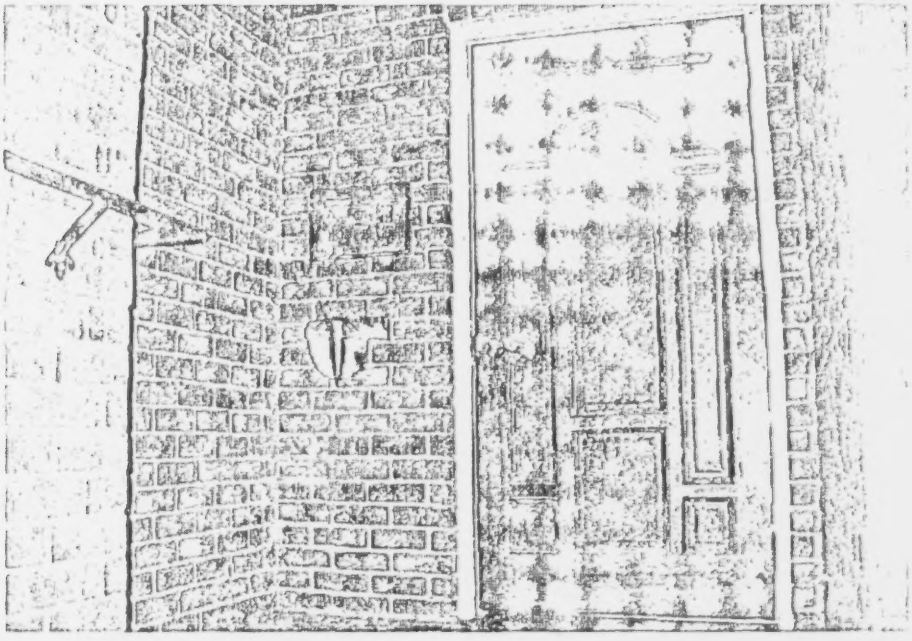

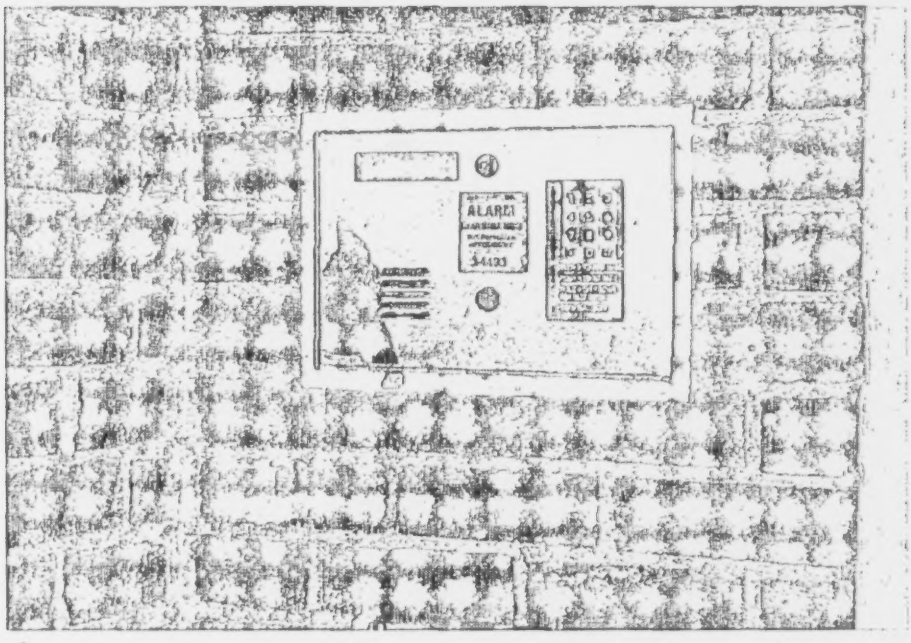
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